T
M3663c
1889

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

GIFT OF
James R. Hutter
'47 Bus. Adm.

D. J. Davies

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/treatiseonconveyancing00mart

A TREATISE

ON THE

LAW OF CONVEYANCING.

BY

W. B. MARTINDALE.

SECOND EDITION:

BY

LYNE S. METCALFE, JR.,
Editor Central Law Journal.

ST. LOUIS, MO.:
CENTRAL LAW JOURNAL COMPANY,
LAW PUBLISHERS AND PUBLISHERS OF THE
CENTRAL LAW JOURNAL.
1889.

Copyright, 1882,
by
W. B. Martindale.

Copyright, 1889,
by
Central Law Journal Company.

T
M3663c
1889

St. Louis, Mo.: Printed by Central Law Journal Company.

RTF 12 May 53

PREFACE TO THE FIRST EDITION.

This volume is designed to present, in a convenient form for ready reference, a concise, yet somewhat comprehensive view of the Law of Conveyancing, applicable to all the States. The aim of the author has been to condense the work by treating the subject with reference to general principles, and by stating, as succinctly as was found to be consistent with accuracy, the propositions decided by the courts, referring the reader to numerous and carefully selected authorities where more extended discussions of the various questions may be found. It has been attempted, in this manner to render the work of service to the profession, and at the same time to meet the wants of a large class of conveyancers, who are specially interested in this branch of the law.

In the preparation of this treatise the author has had the valuable assistance of Mr. Lyne S. Metcalfe, Jr., of the St. Louis Bar, whose skill and experience in examining and digesting authorities, supplemented by an accurate knowledge of the Law of Real Property, has materially contributed to the completion of the work.

St. Louis, Mo., February, 1882.

740782

PREFACE TO THE SECOND EDITION.

The legal profession, or rather that portion of it who buy books, is more responsible than its author or publisher for the appearance of a second edition of this work. Whether by reason of its intrinsic merit or the dearth of books on subjects pertaining to practical Conveyancing, or both, the fact is, that few American treatises have met with as cordial reception, in part evidenced by the rapidity of its sale, as was accorded the first edition. Its success may in a measure be due to the fact that its subject is one of constant and increasing interest, upon which no distinctive American treatise had appeared. But it would be unfair, in estimating the relative causes for its exceptional success, to ignore the real merit of the book, which consists in its admirable arrangement of subjects, its clearness and terseness of style, its condensation of matter, and accuracy of statement, all of which have secured for the author a high rank among modern law writers.

In presenting to the profession a second edition, the editor may be permitted to express a pardonable pride in the reception accorded the first edition, inasmuch as he was a co-laborer in its production, a circumstance which has rendered him better qualified for this revision. It has been his aim to review all the later cases and statutes on the various topics discussed, and to revise and add to the text and citations such as were deemed important or valuable to the practitioner.

LYNE S. METCALFE, JR.

ST. LOUIS, MO., July, 1889.

SUMMARY OF CONTENTS.

PAGE.

TITLE I.—Purchase Deeds.

CHAPTER I.

General Requisites of Deeds, ... 1

CHAPTER II.

The Formal Parts of a Deed, ... 54

CHAPTER III.

The Execution of Deeds, ... 173

CHAPTER IV.

Acknowledgment and Registration of Deeds, ... 222

TITLE II.—Leases.

CHAPTER V.

Leases in General, ... 269

CHAPTER VI.

The Formal Parts of a Lease, ... 284

CHAPTER VII.

The Execution, Assignment and Determination of Leases, . . . 321

TITLE III.—Mortgages.

CHAPTER VIII.

The Nature and History of Mortgages, ... 353

CHAPTER IX.

Form and Requisites of a Mortgage, ... 374

CHAPTER X.

Assignments, and herein of Purchaser of the Equity of Redemption, . 438

CHAPTER XI.

Redemption, Payment and Discharge, ... 467

CHAPTER XII.

Foreclosure, ... 496

TITLE IV.—Wills.

CHAPTER XIII.

The General Requisites of a Valid Devise, ... 533

CHAPTER XIV.

Of the Revocation and Republication of Wills, ... 558

CHAPTER XV.

Of the Probate of Wills, and of their Registration, ... 571

CHAPTER XVI.

Of the Construction of Wills, ... 582

TABLE OF CONTENTS

TITLE I.—Purchase Deeds.

CHAPTER I.

GENERAL REQUISITES OF DEEDS.

ARTICLE I.

CONTRACTS FOR THE PURCHASE AND SALE OF LAND.

SECTION.		PAGE.
1.	Every deed is founded upon a pre-existing purpose,	2
2.	Statutory requisites for a contract of sale,	2
3.	The statute applies to every interest in land,	3
4.	What must be contained in the agreement,	5
5.	Parol evidence, when admissible,	8
*6.	As to the signature,	9
7.	Signature by agent,	10
8.	The equitable doctrine of part performance,	12
9.	The effect of the contract, and herein of specific performance,	15
10.	Whether a deed or an agreement for a deed,	18

ARTICLE II.

DEEDS MAY BE OF WHAT MATERIAL.

13.	Definition of deed,	19
14.	Must be written upon paper or parchment,	20
15.	May be printed, or part printed and part written,	20
16.	Should be written or printed with ink,	21

ARTICLE III.

MUST BE COMPLETELY WRITTEN BEFORE DELIVERY.

18.	Alterations, to be valid, must be made before delivery,	22
19.	Burden of proof,	23
20.	Executed contract not affected by subsequent alterations,	24
21.	Filling up blanks,	25

ARTICLE IV.

OF THE PARTIES TO A DEED.

23.	All persons competent except those under special disability,	28
24.	As to a disseizee,	29
25.	Infants,	

SECTION. PAGE.
26. Persons of non-sane mind, ... 32
27. Married women, ... 33
28. Duress, ... 35
29. Undue influence, ... 36
30. Intoxication, ... 37
31. Joint tenants, ... 38
32. Deeds from husband to wife, ... 39
33. The capacity of a grantee, ... 40
34. The parties must be *in esse*, ... 43

ARTICLE V.

FRAUDULENT CONVEYANCES.

36. When a conveyance will be deemed fraudulent, ... 44
37. Voluntary conveyances, ... 48
38. Deeds obtained by fraud of the grantee, ... 52
39. Conveyances void for other causes, ... 52

CHAPTER II.—The Formal Parts of a Deed.

ARTICLE I.

THE DIFFERENT FORMS OF DEEDS.

42. The common-law conveyance, ... 55
43. Feoffment with livery of seizin, ... 55
44. Gift and demise, ... 56
45. Deed of grant, ... 56
46. Lease, ... 57
47. Exchange, ... 57
48. Partition, ... 58
49. Release, ... 58
50. Confirmation, ... 59
51. Surrender, ... 60
52. Assignment, ... 60
53. Defeasance, ... 60
54. Conveyances derived from the statute of uses, ... 61
55. Covenant to stand seized, ... 61
56. Bargain and sale, ... 62
57. Lease and release, ... 63
58. Fine and recovery, ... 64
59. Quitclaim deeds, ... 64
60. The deeds in use in the United States, ... 66
61. Indentures and deeds poll, ... 67
62. The present division of the parts of a deed, ... 68

ARTICLE II.

AS TO THE DATE OF A DEED.

65. General rules as to the date, ... 69

ARTICLE III.

THE NAMES OF THE PARTIES.

67. It is sufficient if the parties are distinguished. 70
68. The grantor should be named in the deed, ... 71
69. A deed must be to some certain person or corporation named, . . . 72
70. Illustrations of the foregoing principles, ... 73
1. As to matter descriptive of the parties, ... 74

SECTION. PAGE.

ARTICLE IV.

OF THE RECITALS.

73. The purpose of the recitals, ... 75
74. Effect of recitals as notice, ... 76

ARTICLE V.

THE CONSIDERATION.

76. Considerations are of two kinds—good and valuable, . . . 78
77. Consideration not essential at common law, ... 79
78. Is necessary to a bargain and sale or covenant to stand seized, . 79
79. Amount actually paid may be proved, when,

ARTICLE VI.

THE GRANTING CLAUSE.

82. There must be words showing an intention to convey, . . . 83
83. No particular form of words necessary, ... 83
84. Covenants implied by words of grant, ... 84
85. As to words of limitation or inheritance, ... 85

ARTICLE VII.

THE DESCRIPTION OF THE PREMISES.

87. Description must afford means of identifying the land, . . . 86
88. Parol evidence admissible, when, ... 87
89. Deed may be reformed, when, ... 88
90. When resort is to be had to rules of construction, ... 88
91. Reference to condition of the property at the time, ... 89
92. Contemporaneous writings, ... 89
93. A grant of the principal passes the incident. 89
94. A grant in general terms passes all the constituent parts of the thing granted, ... 90
95. All parts of a deed to be construed together, ... 90
96. False surplusage of description, ... 90
97. Where there are two descriptions, the one most definite will control, 91
98. The grammatical sense not always adhered to, ... 91
99. All the instruments construed *contra proferentem*, ... 91
100. Construction always favorable to the purpose of the deed, . . 92
101. Monuments control courses and distances, ... 92
102. Establishment of boundary line by adjoining proprietors, . . 93
103. Reputation, when admissible, ... 94
104. Grant bounded on stream or highway goes to the centre, . . 95
105. As to land bounded by large bodies of water, ... 96
106. The quantity of land mentioned, ... 97
107. The words "more or less," 98
108. Effect of reference to map, survey or another deed, ... 98
109. Exceptions, ... 99

ARTICLE VIII.

THE HABENDUM.

111. The habendum not an essential part of a deed, ... 100
112. Cannot introduce new parcels into the grant, ... 101
113. Party not named in the grant may take under habendum, when . 102
114. As to the estate limited, ... 102
115. Rule in Shelley's case, ... 103
116. A freehold must not be limited to commence *in futuro*, . . 104

SECTION. PAGE.

ARTICLE IX.

THE REDDENDUM.

118. Distinguished from an exception, ... 106
119. The essential to a good reddendum, ... 107

ARTICLE X.

CONDITIONS, LIMITATIONS AND OTHER SPECIAL AGREEMENTS.

121. Such stipulations may appear in any part of the deed, . . . 108
122. A condition defined, ... 108
123. General and special conditions, ... 109
124. Conditions are also either precedent or subsequent, . . . 109
125. Void conditions, ... 110
126. Whether a condition or a covenant, ... 111
127. Conditions distinguished from limitations, ... 112
128. Conditions distinguished from remainders, ... 112

ARTICLE XI.

USES, TRUSTS AND POWERS.

131. The subjects discussed under this head, ... 114
132. Uses defined, ... 114
133. Shifting or secondary uses, ... 116
134. Springing uses, ... 116
135. Future and contingent uses, ... 117
136. Uses in the United States, ... 117
137. Origin of trusts, ... 118
138. Our present system of trusts, ... 119
139. A classification of trusts, ... 119
140. Simple and special trusts, ... 119
141. Executed and executory trusts, ... 120
142. Active and passive trusts, ... 120
143. Ministerial and discretionary trusts, ... 121
144. Trusts divided in reference to their creation, ... 121
145. The parties to a trust, ... 121
146. The creation and assignment of trusts, ... 122
147. Powers are of two sorts, ... 124
148. Powers of appointment defined, ... 124
149. General and particular powers, ... 125
150. Powers collateral, appendant and in gross, ... 125
151. The creation of a power, ... 126
152. The execution of powers, ... 126
153. Who may execute a power, ... 129
154. Conditions annexed to power must be strictly complied with, . 127
155. Power need not be referred to in its execution, ... 120
156. The appointee takes under the original deed, ... 130
157. Equity jurisdiction over the execution of powers, ... 130
158. The suspension and destruction of powers, ... 130

ARTICLE XII.

COVENANTS FOR TITLE.

160. Covenant defined—construction, ... 132
161. Express and implied covenants, ... 133
162. Real and personal covenants distinguished, ... 133
163. The covenants usually contained in deeds, ... 134
164. The covenants of seizin and right to convey, ... 135

SECTION. PAGE.
165. The covenant of seizin is broken, when, ... 136
166. The covenant against incumbrances, ... 139
167. What constitutes a breach of the covenant against incumbrances, . 142
168. The covenant of warranty, ... 146
169. Estoppel by warranty, ... 147
170. What constitutes a breach of the covenant of warranty, . . 148
171. Special warranty, ... 152
172. The covenant for further assurance, ... 154
173. Implied covenants, ... 154
174. Of dependent and independent covenants, ... 158
175. The measure of damages for breach of covenant of seizin, . . 159
176. Damages for breach of covenant against incumbrances, . . 160
177. Damages for breach of covenant of warranty, ... 161

ARTICLE XIII.

THE TESTIMONIUM CLAUSE.

180. It should appear that the instrument was intended to be sealed, . 163
181. Relinquishment of dower and homestead, ... 164
182. As to the relinquishment of dower, ... 165
183. Of the alienation of the homestead, ... 168

CHAPTER III.—The Execution of Deeds.

ARTICLE I.

OF THE READING REQUISITE TO MAKE A VALID DEED.

186. Reading essential, when, ... 173
187. Fraud or mistake in reading vitiates the deed, ... 174

ARTICLE II.

HOW FAR SIGNING IS NECESSARY.

189. Signing was formerly unnecessary, but is now required, . . . 175
190. What constitutes a sufficient signature, ... 175
191. Deeds by corporations, ... 176

ARTICLE III.

AS TO THE SEALS.

193. A seal essential to the validity of a deed at common law, . . 177
194. What will constitute a common-law seal, ... 178
195. A scroll may be used as a seal, in what States, ... 179
196. Several persons may adopt the same seal, ... 180
197. Of corporate seals, ... 181

ARTICLE IV.

ATTESTING WITNESSES.

199. No witnesses required at common law, ... 181
200. The number of witnesses required in the different States, . . 182
201. Qualification of the witnesses, ... 183
202. Witness must sign at grantor's request, ... 184

ARTICLE V.

OF THE DELIVERY OF A DEED.

204. A deed takes effect from delivery—presumptions as to time, . . 185
205. What will amount to a delivery, ... 186
6. The question of delivery always one of intention, ... 188

SECTION. PAGE.

207. The delivery must be known and assented to by the grantee, . . 190
208. Delivery to third person for grantee's use, ... 191
209. The time at which the title passes, ... 192
210. Of the doctrine of relation in deeds, ... 193
211. Effect of a subsequent ratification, ... 194
212. Effect of registration in respect to the delivery of a deed, . . 196
213. Delivery persumed from possession of the grantee, . . . 199
214. Acceptance, when presumed, ... 199
215. Relationship between parties, ... 200
216. Of the delivery of a deed to a married woman, ... 200
217. Delivery of a deed to several grantees, ... 200
218. Of the delivery of a deed by several joint owners, . . . 201
219. Deeds made by and to corporations, how delivered, . . . 201
220. Deed must be completely executed before it can take effect, . 201
221. A deed once delivered cannot be revoked, ... 202
222. The question of delivery always open to proof, ... 203
223. What is an *escrow*, ... 204
224. Deed never an *escrow*, if delivered to the grantee, . . . 204
225. Deed placed in hands of third party when not an *escrow*, . . . 205
226. Deed delivered as an *escrow* has no effect until condition performed, 205
227. Effect of second delivery, ... 206

ARTICLE VI.

POWER OF ATTORNEY TO EXECUTE DEEDS.

230. Definition and requisites of a power of attorney, ... 208
231. Who may appoint an attorney, ... 209
232. As to persons acting in an official or fiduciary capacity, . . 210
233. Who may act as an attorney, ... 211
234. When the authority is conferred upon several, ... 212
235. Powers of attorney are strictly construed, ... 212
236. Authority to execute a deed must be express and special, . . 213
237. Power to sell land means an absolute sale for cash, . . . 214
238. How far necessary that the power should identify the land, . 214
239. Of a power to sell land for a specified purpose, ... 215
240. Relinquishment of dower by attorney in fact, ... 215
241. A power of attorney may be revoked, when, ... 216
242. Of the revocation of a power of attorney, ... 216

ARTICLE VII.

OF THE EXECUTION OF DEEDS BY ATTORNEY.

245. The power must be strictly pursued, ... 217
246. The form in which the agent should execute his authority, . 219

CHAPTER IV.—Acknowledgment and Registration of Deeds.

ARTICLE I.

ACKNOWLEDGMENT OR PROOF OF DEEDS.

248. The provisions regulating acknowledgments are purely statutory. . 222
249. When a certificate of acknowledgment is necessary, ... 223
250. The purpose of the acknowledgment, ... 224
251. Effect of the acknowledgment upon the deed as evidence, . 224
252. The acknowledgment authorizes and gives effect to the record, . 225
253. Who may make the acknowledgment, ... 226

SECTION. PAGE.
254. It is immaterial when the acknowledgment is made, . . . 227
255. What law governs, ... 227
256. Qualification of the officer to act in taking the acknowledgment, . 228
257. As to the date and place of taking the acknowledgment, . . 230
258. The certificate should set out the official character of the officer, . 231
259. The name of the grantor should be stated or referred to, . . 231
260. Statutory requirements must be substantially complied with, . 232
261. The certificate must be subscribed—seal of office, . . . 236
262. The certificate to be on same sheet with the deed, when, . . 237
263. The certificate how far conclusive of the facts stated, . . 238
264. Mistakes in the certificate may be corrected, how, . . . 239
265. Curative statutes, ... 240
266. Proof by subscribing witnesses, ... 241

ARTICLE II.

REGISTRATION OF DEEDS.

269. Registration differs from enrollment, ... 242
270. Equivalent to livery of seizin, ... 242
271. When the record of a deed is constructive notice, . . . 243
272. At what time the record takes effect as notice, ... 245
273. Time allowed for recording—precedence of record, . . . 247
274. When a deed is to be considered as recorded, ... 248
275. In what way the date of filing may be proved, . . . 249
276. To whom the record of a deed is notice, ... 249
277. Of what facts the record is notice, ... 250
278. As to deeds disconnected from the chain of title, ... 251
279. Notice from any other source equivalent to record. . . . 252
280. Possession of the premises is notice, when, ... 253
281. As to what will constitute actual notice, ... 254
282. Notice to the agent is notice to the principal, ... 257
283. The degree of proof required to establish actual notice, . . 258
284. An unrecorded deed is void, when, ... 259
285. Of purchasers by quitclaim deed, ... 260
286. As to the right of a purchaser from an heir, ... 261
287. Purchasers at sheriff's sale entitled to benefit of statute, . 263
288. Equity extinguished by a purchase without notice, . . . 264
289. Effect of mistake in record, ... 265
290. Seal of officer taking acknowledgment need not be recorded, . 266
291. Whether the record of a deed is effectual until indexed, . . 267
292. Corrections and alterations of the record, ... 267

TITLE II.—LEASES.

CHAPTER V.

OF LEASES IN GENERAL.

ARTICLE I.

OF THE DIFFERENT SPECIES OF LEASES.

293. Definition of lease, ... 269
294. Modes of creating tenancies at common law, ... 270
295. Of the different kinds of leases, ... 270
296. Of an estate for life, ... 270
297. Of a term of years, ... 271

SECTION. PAGE.

ARTICLE II.

WHETHER A LEASE OR AN AGREEMENT FOR A LEASE.

303. Agreements for leases are of two sorts, ... 273
304. Whether a lease or an agreement for a lease, ... 274
305. The effect of a want of certainty, ... 275

ARTICLE III.

OF THE PARTIES TO A LEASE.

307. Who may make a lease, ... 276
308. As to a disseizee, ... 276
309. The lease of a disseizee may operate by estoppel, ... 277
310. Of lease made by infants, ... 278
311. As to the lease of a person of non-sane mind, ... 279
312. Of lease made by married women, ... 280
313. Of a lease by the tenant of a term, ... 281
314. Joint tenants and tenants in common, ... 282
315. Of a lease by a mortgagor, ... 282
316. Leases by corporations, ... 282
317. A trustee may grant a lease, ... 283
318. Of a lease by a *cestui que trust*, ... 283
319. Executors and administrators, ... 283

CHAPTER VI.—THE FORMAL PARTS OF A LEASE.

ARTICLE I.

DATE OF COMMENCEMENT AND TERMINATION.

321. Preliminary remarks, ... 284
322. A certain beginning and certain ending essential to a term, . . 285
323. A term originally uncertain may be rendered certain, how, . . 285
324. The time of commencement, how fixed, ... 286

ARTICLE II.

WORDS OF DEMISE—PREMISES LET.

326. The words of demise, ... 287
327. The description of the premises, ... 288

ARTICLE III.

OF THE RESERVATION OF RENT.

329. There must be a consideration—may be what, ... 289
330. Of the words used in reserving rent, ... 289
331. To whom reserved, ... 290

ARTICLE IV.

CONDITIONS OF FORFEITURE AND RE-ENTRY.

333. Purposes and form of such condition, ... 291
334. What covenants may be enforced by condition, ... 291
335. Conditions not favored in law, ... 292
336. The demand necessary to make a condition available, . . . 292
337. What will constitute a breach of the condition, ... 293
338. Proviso for re-entry in case of forfeiture, ... 294
339. Who may take advantage of a condition, ... 294
340. Condition once waived cannot be enforced again, ... 296
341. Until re-entry the estate remains in the lessee, ... 96

SECTION. PAGE.

ARTICLE V.

THE USUAL COVENANTS IN LEASES.

343. Express and implied covenants, ... 297
344. Of the covenants implied on the part of the lessor, . . . 297
345. The covenants implied on the part of the lessee, ... 299
346. Who will be bound by implied, and who by express covenants, . 300
347. Real and personal covenants, ... 301
348. What covenants run with the land, and what do not, ... 302
349. The effect of a covenant running with the land, ... 303
350. When assignees must be named, to be affected by a covenant, . 303
351. The express covenants usually entered into by the lessor, . . 304
352. The covenant for quiet enjoyment, ... 304
353. The covenant to repair, ... 305
354. The covenant to renew the lease, ... 308
355. Covenants against incumbrances—for further assurance, . . 310
356. The usual express covenants on part of the lessee, ... 310
357. Of the covenant to pay rent, ... 310
358. To pay taxes and other assessments charged upon the premises, . 314
359. The covenant to insure the premises, ... 315
360. Not to use the premises for purposes of trade, ... 316
361. Not to assign or underlet, ... 317
362. To deliver up the premises in good repair, ... 318

CHAPTER VII.—THE EXECUTION, ASSIGNMENT AND DETERMINATION OF LEASES.

ARTICLE I.

OF THE EXECUTION OF LEASES.

364. How leases are made and executed to be valid, ... 321
365. In what the execution of a lease consists, ... 323
366. Of the execution of leases by agents, ... 323
367. Leases usually by indenture—requisites of execution, . . . 325

ARTICLE II.

OF THE ASSIGNMENT OF A LEASE.

369. Assignment defined, ... 326
370. Who may make and what will constitute an assignment, . . 327
371. An assignment is either in fact or in law, ... 330
372. Assignments in law, ... 330
373. Of an assignment in fact, ... 331
374. The proper covenants to be inserted in the assignment of a lease, 332
375. The effect of an assignment of a lease, ... 332
376. Continued—rights and liabilities of an assignee, ... 333
377. Of the assignee of the reversion. 335

ARTICLE III.

MODES OF DETERMINING LEASES.

379. The subjects embraced under the present head, ... 337
380. Lapse of time, ... 338
381. The happening of a specified event, ... 338
382. Forfeiture for breach of condition. 339
383. Merger, ... 342
484. Surrender defined, ... 344

SECTION. PAGE.

385. Surrender may be in express words or by operation of law, . . 345
386. Of an express surrender, ... 345
387. Surrender by operation of law, ... 347
388. Tenant's disclaimer, ... 349
389. Failure of the lessor's title, ... 350
390. By force of some statute or the policy of the law, ... 352

TITLE III.—Mortgages.

CHAPTER VIII.

NATURE AND HISTORY OF MORTGAGES.

ARTICLE I.

THE ORIGIN AND DEVELOPMENT OF THE LAW.

395. Definition of a mortgage, ... 354
396. The origin of mortgages, ... 354
397. The *vivum vadium*, ... 356
398. The *mortuum vadium*, ... 356
399. Origin of the English law of mortgages, ... 357
400. A mortgage at the common law, ... 357
401. Origin and growth of the equity of redemption, ... 358
402. Two opposite sets of rules at law and in equity, ... 360
403. The doctrine reduced to a harmonious system, ... 361

ARTICLE II.

THE NATURE OF MORTGAGES IN THE DIFFERENT STATES.

406. Preliminary observations, ... 362
407. The modern common-law doctrine of mortgages, ... 362
408. How this doctrine has been modified in some States, . . . 366
409. How superseded by that of equity in other States, ... 368
410. The consequence resulting from these different views, . . . 370
411. A classification of the States in respect thereto, ... 371

CHAPTER IX.—Form and Requisites of a Mortgage.

ARTICLE I.

WHAT CONSTITUTES A MORTGAGE.

413. The general requisites of deeds apply to mortgages, ... 374
414. What is essential to constitute a mortgage at law, ... 375
415. What will constitute a mortgage in equity, ... 378
416. Parol evidence to prove an absolute deed a mortgage, . . . 380
417. Whether a mortgage or a conditional sale, ... 383

ARTICLE II.

A CLASSIFICATION OF THE DIFFERENT KINDS OF MORTGAGES.

419. The plan of the present chapter, ... 386
420. Mortgages are divided into two general classes, ... 386
421. What are legal mortgages, ... 386
422. The common-law form of a mortgage, ... 387
423. Mortgages with power of sale, ... 387
424. Deeds of trust in the nature of mortgages, ... 388
425. Equitable mortgages defined, ... 389
426. Mortgages by deposit of title deeds, ... 391
427. Vendor's lien for purchase-money, ... 392

SECTION. PAGE.

ARTICLE III.

FORM GENERALLY.

429. No particular form necessary, ... 394
430. Statutory forms, ... 395
431. The clauses of an ordinary mortgage, ... 396

ARTICLE IV.

THE GRANTING PART OF A MORTGAGE.

434. How far the rules governing purchase deeds apply, . . . 396
5. The recital of the indebtedness, and covenant for payment, . 397
436. The consideration named in the mortgage, ... 397
437. The granting clause, ... 398
438. The description of the premises, ... 399
439. The habendum, ... 400

ARTICLE V.

THE DEFEASANCE.

442. The usual form of the condition, ... 401
443. The debt secured, ... 402
444. The description of the debt, ... 409
445. The time of payment, ... 413

ARTICLE VI.

SPECIAL STIPULATIONS.

447. The subjects to be discussed under the present head, . . . 416
448. Covenants for title, ... 416
449. The covenant for the payment of interest, ... 417
450. To keep the premises in repair, ... 422
451. For the payment of taxes, ... 423
452. To keep the premises insured, ... 425
453. Reservation of the right of possession to the mortgagor, . . 427
454. Of the right to perform the condition before the time limited, . 428
455. Of the right to have a portion of the premises released, . . 428

ARTICLE VII.

THE POWER OF SALE.

458. The form and requisites of the power, ... 429
459. The events upon which the exercise of the power depends, . . 435
460. Purchasers not bound to inquire whether they have happened, . 436
461. Application of the proceeds of the sale, ... 436

CHAPTER X.—ASSIGNMENTS—AND HEREIN OF PURCHASERS OF THE EQUITY OF REDEMPTION.

ARTICLE I.

OF PURCHASERS OF THE EQUITY OF REDEMPTION.

463. An important distinction, ... 438
464. Whether a purchaser assumes the mortgage or buys subject to it, 439
465. Of a purchaser subject to the mortgage, ... 440
466. Of one who undertakes to pay the mortgage, ... 443
467. Of a purchaser of part of the mortgaged property, . . . 447

ARTICLE II.

ASSIGNMENTS OF THE MORTGAGE.

469. Conflicting views in the different States, ... 448

SECTION. PAGE.
470. Assignments under the common law doctrine, . . . 449
471. Assignments under the equitable view of a mortgage, . . . 454
472. Rights and liabilities of assignees, ... 457
473. Merger of interests, ... 463

CHAPTER XI—Redemption, Payment and Discharge.

ARTICLE I.

REDEMPTION.

476. Of the right to redeem, ... 467
477. When this right is barred, ... 468
478. Who may redeem, ... 470
479. The sum payable to effect redemption, ... 472
480. Of the mortgagee's liability to account, ... 473
481. Contribution to redeem, ... 476

ARTICLE II.

PAYMENT.

483. The effect of payment or tender before and after default, . . 477
484. As to the sufficiency of a tender, ... 480
485. What constitutes payment, ... 482
486. Presumption of payment, ... 485
487. Subrogation, ... 486

ARTICLE III.

DISCHARGE.

490. Who may make or enter a discharge, ... 487
491. Modes of effecting a discharge, ... 489
492. The effect of a partial release of a mortgage, ... 492
493. A discharge obtained by fraud or made through mistake, . . 494

CHAPTER XII.—Foreclosure.

ARTICLE I.

WHEN THE RIGHT OF FORECLOSURE EXISTS.

496. At what time the right accrues, ... 496
497. When barred by limitation, ... 500

ARTICLE II.

VARIOUS METHODS OF ENFORCING A MORTGAGE.

500. The extent of the present article, ... 503
501. Remedies in the different States, ... 504
502. Foreclosure by suit in equity, ... 505
503. By proceedings at law, ... 507
504. By entry and possession, ... 508

ARTICLE III.

FORECLOSURE BY SALE UNDER POWER.

507. The scope of the present article, ... 509
508. Power of sale a cumulative remedy, ... 509
509. When its exercise will be enjoined, ... 511
510. Who may exercise the power, ... 514
511. What notice is to be given, ... 515

SECTION. PAGE.
512. Requisites of the notice, ... 517
513. Conduct of the sale, ... 524
514. Who may purchase, ... 528
515. The deed, ... 530

TITLE IV.—WILLS.

CHAPTER XIII.

THE GENERAL REQUISITES OF A VALID DEVISE.

ARTICLE I.

THE NATURE OF A WILL.

518. Preliminary remarks, ... 533
519. Definitions, ... 534
520. The distinction between a will and a deed, ... 535

ARTICLE II.

THE PARTIES TO A DEVISE.

523. There must be competent parties to every valid devise, . . 536
524. The age at which persons may devise their estates, . . . 537
525. Coverture as a testamentary disability, ... 538
526. Persons of non-sane mind—duress, ... 539
527. Deaf, dumb and blind persons, ... 540
528. Persons under disability for crime, ... 541
529. As to the devisee, ... 541

ARTICLE III.

THE PROPER SUBJECT OF A DEVISE.

531. Proper subject-matter essential to every devise, ... 542
532. What law governs, ... 543
533. What estate or interest in land will pass by devise, . . . 543
534. As to after-acquired property, ... 544
535. Cumulative devises, ... 544
536. The equitable conversion of real estate into money, . . . 545

ARTICLE IV.

THE EXECUTION OF WILLS.

539. The subject governed by statute, ... 546
540. Will must be in writing—on what material, ... 546
541. Signature of the testator—seal, ... 548
542. Attesting witnesses, ... 550
543. Holographic wills, ... 557

CHAPTER XIV.—OF THE REVOCATION AND REPUBLICATION OF WILLS.

ARTICLE I.

REVOCATION.

546. A will always a revocable instrument, ... 558
547. Methods of revoking wills, ... 559
548. Revocation by subsequent will or codicil, ... 559
549. By the cancellation or destruction of the will, ... 561
550. By the alienation or alteration of the estate, ... 564
551. By marriage and birth of issue, ... 566

SECTION. PAGE.

ARTICLE II.

REPUBLICATION.

553. Express republication, ... 568
554. Constructive republication, ... 569

CHAPTER XV.—Of the Probate of Wills and of their Registration.

ARTICLE I.

OF THE PROBATE OF WILLS.

557. Preliminary to the probate, ... 571
558. Jurisdiction of the probate of wills—foreign wills, ... 573
559. Mode of proof, ... 576
560. The effect of probate, ... 577

ARTICLE II.

OF THE REGISTRATION OF WILLS.

563. Will and proof to be recorded in the office of probate, . . . 579
564. Certified copies may be used in evidence, or recorded in other counties, 580
565. Foreign wills probated and recorded as other wills, ... 580
566. Where wills are to be recorded in the registry of deeds, . . 580

CHAPTER XVI.—Of the Construction of Wills.

ARTICLE I.

GENERAL RULES OF CONSTRUCTION.

569. Extent of the present chapter, ... 582
570. The intention of the testator the object of all construction, . . 583
571. Jarman's rules for the construction of wills, ... 584

ARTICLE II.

CONSTRUCTION AS TO DEVISEES.

574. Misnomer and misdescription, ... 589
575. Who are entitled under the description, ... 590
576. Taking *per stirpes* or *per capita*, ... 592
577. Lapsed devises, ... 593

ARTICLE III.

AS TO THE ESTATE AND PROPERTY DEVISED.

580. What general words carry real estate, ... 593
581. The estate or interest which passes, ... 594
582. Description of the property devised, ... 595

ARTICLE IV.

OF A POWER TO SELL LANDS.

585. By what words a power is created, ... 596
586. Execution of a power in a will, ... 598

TABLE OF CASES.

[The references are to sections.]

A.

Abbe v. Goodwin, 476.
Abbott v. Abbott, 88, 91.
Allen, 164, 175.
Alsdorf, 222.
Baldwin, 8.
Creal, 26.
Cromartie, 183.
Hurd, 32.
L'Homedieu, 9.
Abell v. Coldwood, 2.
Coons, 466.
Lathrop, 188.
Radcliff, 4, 354.
Williams, 387.
Abrams v. Ervin, 256.
Academy of Music v. Hackett, 336.
Acer v. Hotchkiss, 487.
Acer v. Westcott, 74, 277.
Ackens v. Winston, 445, 449.
Acker v. Ledyard, 19.
Phœnix, 78.
Ackla v. Ackla, 491.
Adair v. Adair, 472.
Adam v. Ames Iron Co., 48.
Adams v. Adams, 582.
Alkire, 101.
Bishop, 255.
Buchanan, 427.
Corriston, 409.
Cuddy, 288.
Field, 541.
Goddard, 386.
Guerard, 136.
Hayden, 271.
Knowlton, 36.
Medsker, 68.
Parker, 470.
Pease, 105.
Ross, 25. 171.
Scales, 4.
Scott, 513.
Stevens, 89, 442.
Stringer, 28.
Valentine, 9, 126.
Warner, 99.
Williams, 174.
Winne, 550.
Addis v. Graham, 290.
Adkins v. Lewis, 480.
Adluna v. Yard, 50.
Adsit v. Adsit, 535.
Ætna Life Ins. Co. v. Corn, 473.
Agricultural Bank v. Rice, 68.
Ahrend v. Odiorne, 427.
Aiken v. Gale, 467, 481.
Milwaukee, etc. R. Co., 473.
Smith, 304.
Ainsworth v. Ritt, 357.
Aitkin v. Young, 8.
Akers v. Ackers, 575.
Alabama, etc. Ins. Co. v. Boykin, 265.
Pettway, 36.
Albert v. Burbank, 221.
Albertson v. Ashton, 7.
Albin v. Lord, 312.
Albright v. Cobb, 409.
Alcott v. Bynum, 511, 512.
Alderman v. Neate, 304, 305.
Aldrich v. Dunn, 427.
Alemany v. Daly, 238.
Alexander v. Alexander, 212.
Alexander v. DeKermel, 204.
Alexander v. Merry, 260.
Saloy, 443.
Schreiber, 173.
Todd, 36.
Algur v. Gardner, 449.
Allaire v. Day, 37.
Allard v. Lane, 491.
Allen's Will, 542.
Allen v. Allen, 73.
Bennett, 6.
Clark, 478. 481.
Davison, 9.
Deming, 39.
Dent, 382.
Griffin, 542.
Holten, 111, 171.
Hooper, 32, 27.
Jaquish, 364.
Kingsbury, 104.
Lenoir, 263.
Little, 525.
Paul, 388.
Ranson, 514, 458.
Sawyer, 486.
Sayward, 169, 171, 173.
Taft, 108.
Wooley, 347. 371.
Woodruff, 425.

Alley v. Bay, 183.
Lawrence, 154.
Allis v. Billings, 26.
Allore v. Jewell, 26, 29.
Alstin v. Cundiff, 417.
Altringer v. Capehart, 79.
American Board v. Nelson, 551.
American Emigrant Co. v. Call, 291.
Amis v. Satterfield, 29.
Amonett v. Amis, 448.
Amory v. Fairbanks, 485.
Fellows, 542.
Kaunoffsky, 387.
Meredith, 155.
Amphlett v. Hibbard, 183.
Anderson v. Baughman, 100.
Baumgartner, 471.
Dugos, 273.
Knox, 166, 176.
Layton, 74, 277.
Lewis, 204.
Powers, 2.
Smith, 36, 388.
Shockley, 8.
Tompkins, 31.
Andress v. Weller, 574.
Andrews v. Andrews, 9.
Brumfield, 580.
Davidson, 166.
Fiske, 470.
Murphy, 87.
Pearson, 87.
Poe, 449.
Pond, 449.
Spurlin, 115.
Todd, 88.
Torrey, 472.
Angier v. Masterson, 397.
Anketel v. Converse, 427.
Ann Arbor Sav. Bank v. Webb, 473.
Annan v. Tolson, 263.
Annapolis & E. R. R. v. Gantt, 411.
Annin v. Annin, 32.
Anson v. Townsend, 8.
Anthony v. Anthony, 416.
Herman, 466.
Hutchings, 26, 29.
Rogers, 480.
Antoni v. Belknap, 381.
Anworth v. Johnson, 345.
Apgar v. Christopher, 31.
Apperson v. Moore, 438.
Appleget v. Smith, 532, 534.
Appleton v. Boyd, 490
Archambau v. Green, 414.
Arfridson v. Ladd, 246.
Arguello v. Edinger, 8.
Arlin v. Brown, 427.
Armentrout v. Gibbons, 289.
Armstrong v. Armstrong, 541.
Darby, 173.
Dominick, 509.
Kerns, 153.
Pearce, 180, 195.
Ross, 249, 260.
Sanford, 509.
Stovall, 264.
Wheeler, 376.
Arn v. Hoerseman, 36.
Arnold v. Foot, 443.
Mattison, 416.
Patrick, 225.
Richmond Iron Works, 26.
Stephenson, 8.
Arnot v. Alexander, 354.
McClure, 515.
Post, 483.
Arques v. Wasson, 438.
Arrison v. Harmstad, 20.
Arthur v. Anderson, 206.
Weston, 70.
Artz v. Grove, 115.
Asay v. Hoover, 407.
Asheroft v. Eastern R. R., 118, 119.
Ashville Div. v. Astor, 69.
Ashley v. Warner, 381.
Aston v. Robinson, 9.
Astor v. Hoyt, 370.
Miller, 348, 358.
Robinson, 9.
Atchison etc. Co., v. English, 4.
Athens v. Nale, 168.
Atherton v. Toney, 465.
Atkins v. Kron, 582.
Atkinson v. Augert, 483.
Dixon, 362.
Duffy, 512.
Phillips, 37.
Stewart, 483
Atlantic Dock Co. v. Leavitt, 61. 466.
Attorney General v. Gleg, 143.
Attwater v. Attwater, 125.
Kinman, 512.
Atwood v. Cobb, 10.
Fisk, 443.
Vincent, 427.
Aubuchon v. Bender, 284.
Auburn Church v. Walker, 108.
Auburn Theo. Sem. v. Calhoun, 559.
Augur v. Winslow, 484.
Auli v. Lee, 444.
Aultman v. Obermeyer, 32.
Richardson, 69.
Auriol v. Mills, 346, 372.
Aurora City v. West, 449.
Austin v. Ahearne, 309.
Austin, 443.
Downer, 415.
Imus, 449.
Austrian v. Davidson, 88.
Averill v. Taylor, 304.
Averill Coal Co. v. Verner, 449.
Ayer v. Emery, 126.
Ayers v. Ayers, 542.
Avery v. Pixley, 380, 549.
Ayre v. Ayre, 33.
Ayres v. Harness, 21.
Probasco, 183.
Waite, 477.
Ayres v. Watson, 443.

B.

Babb v. Clemson, 20.
Babbitt v. Johnson, 256.
Babcock v. Hoey, 181.
Kennedy, 407.
Scoville, 376.
Utter, 104.
Bach v. Abbott, 472.
Backus v. McKoy, 164.
Bacon v. Cattrell, 480.
Bowdoin, 304.
Goodnow, 472.
Kennedy, 512.
Lincoln, 165.
McIntire, 497.
Western Furniture Co., 382.
Badger v. Phinney, 25.
Bagley v. Blackman, 542.
Morrill, 101.
Bailey v. Delaplaine, 386.
Gould, 471.
Myrick, 480, 481.
Patterson, 575.
Richards, 383.
Smith, 472.
Taylor, 19.
Timberlake, 478.

Wells, 375, 386.
Willard, 487.
Baille v. Rodway, 377.
Bainbridge v. Owen, 480.
Baird v. Evans, 256.
Baker's Appeal, 540.
Baker v. Bank of Louisiana, 438.
Bliss, 281.
Bowdoin, 304.
Dening, 190.
Haskell, 208, 211, 212.
Hunt, 164.
Matcher, 74.
Mather, 277.
Morton, 28.
Noll, 388.
Pierson, 479.
Pratt, 386, 387.
Stewart, 33.
Washington, 271.
Wind, 422.
Woodbridge, 541, 542.
Balbage v. Bottos, 260.
Balch v. Onion, 479.
Baldrick v. Garvey, 26.
Baldwin v. Brown, 102.
Flagg, 27
Jenkins, 414, 429.
Marshall, 292.
Richardson, 31.
Tuttle, 37.
Walker, 377.
Bales v. Perry, 513.
Ball v. Dunstervile, 245.
Wyeth, 497.
Ballentine v. Proudfoot, 526.
Ballard v. Child, 171.
Perry, 261.
Balliet's Appeal, 550.
Ballow v. Hale, 31.
Bamber v. Savage, 4.
Bane v. Detrick, 28.
Banfield v. Whipple, 39.
Bangs v. Lowher, 174.
Bank v. Carpenter, 425
Houseman, 55.
Bank of Cumberland v. Bugbee, 196.
England v. Tarleton, 469.
Hamilton v. Dudley, 319.
Indiana v. Anderson, 471.
Kentucky v. Haggin, 289.
Jones, 200, 249.
Limestone v. Penick, 18.
Louisville v. Gray, 231.
Metropolis v. Guttschlick, 497.
Ogdenburg v. Arnold, 496.
Rochester v. Gray, 194.
South Carolina v. Rose, 443.
U. S. v. Davis, 282.
Dunn, 5.
Husman, 37.
Waggener, 449.
Utica v. Mersereau, 309.
Westminster v. Whyte, 415, 416.
Bancroft v. Curtis, 32.
Banks v. Banks, 549.
Haskie, 354.
Jones, 571.
Lee, 19.
McClellan, 449.
Ogden, 104.
Banning v. Armstrong, 512.
Bannister v. Roberts, 449.
Banta v. Vreeland, 493.
Barber v. Babel, 183.
Cary, 154.
Barclay v. Bates, 4.
Bareland v. Mayo, 36.
Barger v. Miller, 246.
Barhydt v. Burgess, 375.
Barker v. Bell, 549, 553, 554.
Flood, 473.
Keate, 373
Parker, 470.
Rollins, 181.
Barksdale v. Barksdale, 549.
Elam, 124.
Barlow v. Hinton, 206.
McKinley, 167.
St. Nichols Nat. Bank, 167.
Barnard v. Campan, 289.
Kellogg, 5.
Barnes v. Barnes, 9.
Brown, 8.
Burt, 118.
Camack, 493.
Hatch, 212.
Taylor, 146.
Worlich, 449.
Barnet v. Barnet, 265.
Barnett v. Barnes, 357.
Barney v. Keith, 173.
Little, 271.
McCarty, 291.
Sutton, 261.
The City of Keokuk, 105.
Barnstable Savings Bank v. Barrett, 491.
Barnum v. Farthing, 32.
Barrell v. Hanrick, 146.
Barrett v. Barrett, 279, 281.
Carter, 417.
Duke of Bedford, 99.
French, 28, 116.
Barrington v. Bank of Washington, 18.
Barron v. Martin, 477.
Barrows v. Barrows, 37.
Barruso v. Madan, 174.
Barry v. Coombe, 4.
Hoffman, 204.
Barter v. Greenleaf, 79.
Bartholomew v. Candee, 164.
Bartholomew's Appeal, 548.
Bartlett v. Borden, 407.
Drake, 38, 190, 245.
Farrington, 389.
Sutherland, 154.
Barton v. Morris, 265.
Basford v. Pearson, 4, 165.
Bason v. King's Mt. Min. Co., 191.
Bass v. Estill, 252, 271.
Bassard v. White, 252.
Basse v. Gallegger, 496.
Bassett v. Bassett, 444.
Brown, 38.
Bassett v. Hawk, 246.
Batchelder v. Dean, 323.
Batchelor v. Whitaker, 85, 114.
Bates v. Conrow, 477.
Foster, 173.
Hurd, 146.
Norcross, 168, 169.
Ruddick, 467, 481.
Batting v. Martin, 373.
Batty v. Snook, 477.
Baughman v. Penn, 36.
Baum v. Grigsby, 427.
Baxter v. Arnold, 108.
Bush, 25, 33, 310.
Bodkin, 27.
Dear, 414.
Lansing, 382.
Smith, 33.
Willey, 417.
Bay v. Williams, 466.
Bayer v. Cockerill, 33, 59.
Bayley v. Bailey, 205, 211, 414.
Greenleaf, 427.
Baylies v. Payson, 146.
Bayliss v. Williams, 29, 79.
Bazemore v. Davis, 277.

Beach v. Miller, 167.
Nixon, 382.
Packard, 79.
Shaw, 478.
White, 37.
Beachcroft v. Beachcroft, 574.
Beal v. Blair, 88.
Boston Car Spring Co., 377.
Beall v. Berkhalter, 173.
White, 385, 387, 438.
Beaman v. Buck, 2.
Russell, 19.
Whitney, 70, 256.
Bean v. Atlantic & St. L. R. Co., 452.
Atwater, 174.
Boothby, 473.
Coleman, 119.
Kenmuir, 113.
Mayo, 167.
Smith, 36.
Valle, 4.
Beardsley v. Knight, 194.
Tuttle, 443.
Beasley v. Bray, 36.
Beatie v. Butler, 458, 512.
Beaumont v. Keim, 553.
Beaven v. Speed, 183.
Bear v. Flues, 297.
Beeker v. Quigg, 249, 260.
Beckett, Re, 543, 593.
Beckwith v. Taylor, 6.
Bedell v. McClellan, 508, 509.
Bedford v. Terhune, 349, 373, 387.
Bedford v. Tupper, 291.
Bedford Com. Ins. Co. v. Covell, 246.
Bedilin v. Seaton, 146.
Bedinger v. Wharton, 25.
Beebe v. Morris, 502.
Swartwout, 170.
Beekman v. Frost, 289.
Beer v. Beer, 314.
Beers, *Ex parte*, 542.
Behrman v. Barto, 354.
Belcher v. Belcher, 30.
Belden v. Seymour, 79, 106.
Belk v. Massey, 273.
Bell v. Adams, 31.
Day, 449.
Evans, 279, 287.
Farmers Bank, 208, 209, 214.
Fry, 271.
Golding, 327.
Humphrey, 570.
Keefe, 180, 195.
Lent, 449.
Mayor, etc., 480.
McDuffie, 14.
Morse, 471.
Prewitt, 444.
Radcliff, 438.
Scammon, 53, 55, 76, 116.
Simpson, 471.
Tenny, 473.
Twilight, 277, 280, 288.
Belloe v. Rogers, 502.
Belmont v. Coman, 464.
Belo v. Mayes, 260.
Beltram v. Villere, 451.
Benedict v. Gilman, 479.
Benhaim v. Rowe, 480, 514.
Benjamin v. Cavaroc, 502.
Heeney, 345, 353.
Zell, 3.
Benkendorf v. Vincenz, 512, 513.
Bennet v. Bittle, 582.
Bennett v. Abrams, 8.
Bittle, 357.
Brundage, 513.
Culver, 126.
Jenkins, 177.
Bennett v. McGuire, 36.
Paine, 258.
Shipley, 256.
Solomon, 471.
Stevenson, 445.
Titherington, 284.
Union Bank, 445.
Waller, 208, 209.
Wolverton, 415.
Bennock v. Whipple, 414.
Bensel v. Gray, 374.
Bensley v. Atwill, 212.
Burdon, 73
Benson v. Hobbs, 174.
Bentley v. Whittemore, 493.
Benton v. Horsley, 107.
Benton v. Jones, 37.
Beny v. Anderson, 226.
Berkshire etc. Ins. Co. v. Sturgis, 212.
Berrington v. Casey, 326, 344.
Berry v. Anderson, 206.
Haines, 18.
Whitney, 9.
Wright, 87.
Bertie v. Falkland, 124.
Bertles v. Noonan, 33.
Bertram v. Cook, 388.
Curtis, 167.
Besser v. Hawthorn, 409, 473.
Bethell v. Moore, 549.
Bethlehem v. Annis, 443.
Betsey v. Torrence, 24.
Beverly v. Ellis, 289.
Bibb v. Freeman, 37.
Bicer v. Hall, 526.
Bickley v. Keenan, 190.
Biddle v. Coryell, 174.
Littlefield, 367.
Reed, 344.
Biddulph v. St. John, 484.
Bidwell v. Whitney, 509.
Bigelow v. Hubbard, 167.
Topliff, 31, 274.
Biggs v. Brown, 297.
Bigler v. Furman, 388.
Waller, 512.
Billing's Est., 573.
Billings v. Carney, 304.
Billings v. Kankakee Coal Co., 88.
Morrow, 235.
Stark, 65. 204, 213.
Billingsley v. Bates, 108.
Harris, 577.
Billington v. Welsh, 280.
Bingham v. Bailey, 25.
Thompson, 415.
Binsse v. Paige, 415.
Birch v. Birch, 526.
Bird v. Decker, 407.
Keller, 477.
Wilkinson, 416.
Birdsall v. Patterson, 449.
Birnie v. Maine, 492, 497, 503.
Bisbee v. Hall, 373.
Biscoe v. Byrd, 257.
Bishop v. Douglass, 464.
Jones, 36.
Schneider, 249, 252, 263, 271, 291.
Stebbins, 36.
Bissell v. Bugbee, 466.
Kellogg, 443.
Bissett v. Bissett, 263.
Bitter v. Calhoun, 497.
Bivens v. Phifer, 576.
Black v. Ellis, 232.
Erwin, 542.
Gregg, 425.
Hill, 571.
Hills, 25.
Hoyt, 208.

Thornton, 213.
Shreve, 222, 226, 227.
Blackberby v. Holton, 76.
Blackburn v. Gregson, 427.
Blackmore v. Boardman, 354.
Blagge v. Miles, 155.
Blair v. Bass, 471.
Hardin, 173.
Valliant, 251.
Ward, 492.
Blain v. Stewart, 249.
Blake v. Burnham, 175.
Blake v. Flash, 65, 204.
Foster, 318.
Williams, 471.
Bakeley v. Blakely, 29
Blakemore v. Taber, 438.
Blachard v. Blanchard, 547, 549.
Brooks, 171, 407.
Kenton, 416.
McDougall, 8.
Tyler, 65, 201, 281.
Bland v. Tally, 3.
Blaney v. Bearce, 407, 411.
Rice, 102.
Blankenship v. Stout, 25.
Bledsoe v. Nixon, 449.
Bleecker v. Ballow, 358.
Smith, 340, 382.
Blethen v. Dwinel, 270, 486.
Blewer v. Brightman, 580.
Blight v. Banks, 284, 427.
Schenck, 226.
Bliss v. Clark, 235.
McIntyre, 20.
Blockley v. Fowler, 514.
Blodgett v. Moore, 551.
Wadhams, 491.
Blondeau v. Sheridan, 166.
Blood v. Blood, 251, 271.
Goodrich, 230.
Humphrey, 231.
Bloomer v. Henderson, 280, 472.
Merrill, 387.
Waldron, 154, 237.
Blossom v. Brightman, 31.
Vancourt, 84, 167, 173.
Blount v. Blount, 76.
Moore, 585.
Blum v. Mitchell, 480.
Blyer v. Monholland, 465.
Blythe v. Dennet, 382.
Board etc. v. Babcock, 291.
Boardman v. Dean, 78, 212.
Larrabee, 473.
Read, 87, 88.
Boarman v. Catlett, 478.
Bobb v. Barnum, 71.
Bobbitt v. Flowers, 443.
Bocock v. Pavey, 232.
Bogart, *Re*, 542.
Bogert v. Hertell, 536.
Boggs v. Anderson, 280.
Bogle v. Hammons, 28.
Bogue v. Williams, 280.
Bogy v. Shoab, 59.
Bohanan v. Waleot, 549.
Bohannan v. Combs, 37.
Bohannons v. Lewis, 196.
Bolles v. Duff, 502.
Bolling v. Teal, 260.
Bolton v. Lann, 102.
Bond v. Aitkin, 31, 314.
Bond's Appeal, 571.
Boody v. Davis, 208, 212, 444.
McKinney, 25.
Booker v. Anderson, 479.
Jones, 438.
Wingo, 27.
Booknan v. Burnett, 496.
Bool v. Mix, 25, 27, 310.
Boon v. Murphy, 427.
Boone v. Clarke, 231.
Moore, 67.
Boorman v. Johnston, 5.
Booth v. Barnum, 411.
Cook, 261.
Hoskins, 111.
Starr, 162.
Boothroyd v. Engles, 70.
Boquet v. Coburn, 478.
Borland v. Walrath, 263.
Borum v. King, 76.
Bosley v. Bosley, 550.
Bossard v. White, 271.
Boston v. Condit, 31.
Boston Bank v. Chamberlin, 25.
Reed, 407.
Bostwick v. Atkin, 25.
Williams, 167, 168, 170.
Boswell v. Goodwin, 443.
Bosworth v. Stuttevant, 87.
Bougher v. Wilkins, 344.
Bouldin v. Reynolds, 28.
Bouligny v. Fortier, 472.
Bouner v. Metcalf, 79.
Boutwell v. Steiner, 514.
Bowget v. Monroe, 9.
Bowdish v. Dubuque, 388.
Bowe v. Harrisburg, 353.
Bower v. McCormick, 74.
Bowers v. Bowers, 3, 8, 551.
Chambers, 193.
Porter, 575.
Oyster, 413.
Bowen v. Beck, 466.
Bowen v. Johnson, 550.
Kurtz, 464.
Wood, 438.
Bowes v. Seeger, 490.
Bowles v. Wathan, 29.
Bowling v. Cook, 471.
Bowman v. Conn, 2, 3.
Foot, 382.
Manter, 485.
Walford, 8.
Bowser v. Cravener, 4.
Bowyer v. Martin, 36.
Seymour, 382.
Boxheimer v. Gunn, 486, 491.
Boyd v. Cudderback, 183.
De La Montaguie, 37.
Harris, 486.
Parker, 485.
Slayback, 204.
Boyer v. Boyer, 502.
Boykins v. O'Hara, 236.
Boyle v. Edwards, 177.
Boylston v. Carver, 108.
Boynton v. Reynolds, 180, 195.
Sawyer, 182.
Boze v. Arper, 287.
Brackett v. Biddon, 288.
Waite, 37.
Bradford v. Belfield, 458.
Damson, 259.
Harper, 427.
Marvin, 427.
Pitts, 90.
Randall, 194.
Bradhurst v. Bradhurst, 578.
Bradlee v. Boston Glass Manufactory, 246.
Bradley v. Chester Valley R. Co., 458, 502.
Fuller, 407.
Snyder, 479.
West, 257.
Brady v. Cubitt, 551.
Spurck, 59, 164, 176.
Waldron, 450.

Bragdon v. Hatch, 512.
Bragg v. Paulk, 146.
Brainard v. Cooper, 502.
Braman v. Bingham, 224.
Brame v. Craig, 183.
Bramhall v. Flood, 444.
Branch Bank v. Fry, 407.
Brand v. Brand, 201.
Brandon v. Brown, 25.
Brandt v. Foster, 165, 170.
Branger v. Manciet, 170, 344.
Branhan v. San Jose, 50.
Brannon v. Brannon, 255.
Hursell, 443.
Brant v. Robertson, 417, 443.
Virginia Coal & Iron Co., 585.
Wilson, 548.
Brant's Will, 535.
Brantley v. Southern Life Ins. Co., 235.
Wolf, 25.
Brattle Square Church v. Grant, 127.
Bratton v. Allison, 449.
Brauns v. Stearns, 5.
Brawner v. Franklin, 25.
Bray v. Clapp, 32.
Brearly v. Brearly, 571.
Breathitt v. Whittaker, 546, 547.
Breckenridge v. Brooks, 480.
Clinkinbeard, 8.
Ormsby, 25, 26.
Todd, 204.
Breeding's Heirs v. Taylor's Heirs, 377.
Brenner v. Bigelow, 388.
Brent v. Yerton, 27
Bressler v. Kent, 27.
Brevard v. Neely, 220.
Brevoort v. Randolf, 443.
Brewer v. Baxter, 520.
Connell, 182.
Dyer, 331, 373, 386, 387.
Hardy, 55, 56, 78, 116.
Staples, 465.
Brewnan v. Wilson, 31.
Brewster v. Hill, 297.
McFremery, 353.
Striker, 148, 157.
Brewton v. Watson, 56.
Brick v. Coster, 170.
Bridge v. Hubbard, 449.
Bridger v. Pierson, 118, 119.
Bridges v. Eggleston, 36.
Longman, 423.
Bridgham v. Tileston, 373.
Briggs v. Briggs, 116, 512.
Fish, 395.
Hannowald, 471.
Langford, 472, 534.
Lowry, 370.
Morse, 167.
Seymour, 415, 491.
Brimmer v. Sohier, 554.
Brinsmet v. Weaver, 27.
Brinckerhoof v. Remsen, 542.
Bringloe v. Goodson, 158.
Brink v. Spaulding, 6.
Brinkerhoff v. Olp, 4.
Brinkman v. Jones, 409.
Brinkmeyer v. Browneller, 443.
Brinley v. Mann, 246.
Whiting, 24.
Brinton v. Seevers, 260, 265, 271.
Brisbane v. Stoughton, 423, 458.
Brittain v. Work, 206.
Brobst v. Brock, 407, 486.
Brockenbrough v. Ward, 174.
Broeket v. Foscue, 79.
Brohawn v. Van Ness, 364.
Bronson v. Coffin, 167, 236.
Kinzie, 501.
La Crosse R. Co., 443.
Brookbank v. Kennard, 32.
Brookfield v. Goodrich, 274.
Brookhaven v. Baggett, 304.
Brookings v. White, 443, 445.
Brooks v. Chaplin, 257.
Dalrymple, 37.
Evetts, 570.
Ishell, 221.
Moody, 167.
Sullivan, 31.
Wheelock, 2.
Brossart v. Corlett, 119.
Brouwer v. Jones, 360
Brower v. Callender, 28.
Brown v. Austen, 208, 209.
Bamser Coal Co., 285.
Becknall, 486.
Blydenburgh, 470.
Brown, 32, 186, 211, 550.
Caldwell, 25.
Christie, 427.
Clark, 542, 554.
Coble, 4.
Cole, 476.
Combs, 146.
Coon, 183.
Cram, 411.
Crump, 345.
Dean, 429.
Delaney, 458, 510.
Dewey, 417.
Eaton, 7.
Higgs, 148.
Huger, 101.
Jackson, 171.
Lapham, 487.
Leach, 453.
Lindsay, 312.
Lord, 8.
Lunt, 256, 271.
McAlister, 542.
McCormick, 309.
Manning, 34.
Manter, 249, 251, 279.
Moore, 256.
Nickle, 414.
Parsons, 354.
Peck, 28.
Brown v. Pforr, 241.
Pinkham, 21.
Powell, 313.
Reynolds, 224.
Simons, 492.
Simpson, 271.
Spivey, 37
Staples, 448
Stewart, 407, 411.
Thorndike, 549, 550.
Thrale, 111.
Vanlier, 427.
Wood, 600.
Worcester Bank, 478.
Young, 170.
Brown's Admr. v. Bragg, 382.
Browne v. O'Dea, 329.
Brownfield v. Wilson, 548.
Brownlee v. Arnold, 445.
Bruce v. Bonney, 493.
Perry, 249.
Bruck v. Tucker, 9.
Brueggeman v. Jurgensen, 9.
Brugman v. Noyes, 360.
Brummet v. Weaver, 27.
Brunson v. Morgan, 31.
Brunswick-Balke Co. v. Brackett, 266.
Rees, 344.
Brunswick Sav. Inst. v. Crossman, 97.
Bruse v. Nelson, 493.
Brush v. Ware, 74.
Wilkins, 551.

Bryan v. Bradley, 43, 136, 207.
Cowart, 416.
Ramirez, 260.
Wash, 205, 215.
Bryant v. Carson River Lumbering Co., 508.
Damon, 470, 471.
Derberry, 575.
Erskine, 443.
Vix, 472.
Brydon v. Campbell, 252, 271, 289.
Buchanan v. Griggs, 25.
Hazzard, 27.
Moore, 103
Monroe, 401.
Buck v. Axt, 28
Payne, 409.
Bucker v. Street, 171
Buckland v. Hall, 354.
Buckley v. Beardslee, 4
Daley, 408, 409. 411.
Early, 265.
Buckmaster v. Harrop, 4, 8.
Kelley, 486.
Buckner v. Warren, 333.
Budd v. Brooke. 111.
Buell v. Cook, 304.
Irwin, 261.
Buffalo R. R. Co. v. Stigeler, 101.
Bufford v. Smith, 496.
Buffum v. Green, 211.
Hutchinson, 85.
Buhose v. Young, 275.
Bulkley v. Buffington, 212.
Chapman, 470.
Dayton, 490.
Bullard v. Briggs, 79.
Bowers, 182.
Johnson, 370, 377.
Bullene v. Garrison, 256.
Bullitt v. Taylor, 37, 212.
Bullock v. Dommitt, 345.
Bumgardner v. Allen, 464.
Bunce v. Reed, 512.
Bunde v. McKnight, 542.
Bunham v. Kidwell, 26.
Bunker v. Barnum, 415, 429.
Bunn v. Ahl, 36.
Winthrop, 213.
Bunst v. Davis, 533.
Buntin v. Johnson, 542.
Burbank v. Gould, 460.
Pillsbury, 167.
Warwick, 472.
Burehard v. Frazer, 443, 449.
Burden v. Thayer, 377.
Burdeno v. Amperse, 32.
Burdett v. Clay, 443, 471.
Burdick v. Burdick, 24.
Jackson, 425.
Burge v. Smith, 181, 182.
Burguin v. Bishop, 19.
Burgess v. Pollock, 26.
Burk v. Hill, 167.
Burke v. Beveridge, 175.
Nichols, 165, 170.
Burkholder v. Cased, 205, 206.
Burleigh v, Clough, 148.
Burlington University v. Barrett, 532
Burnes v. McCubbin, 337.
Burnet v. Burnet, 571, 576.
Denniston, 478, 509, 512.
Burnett v. Lynch, 376.
Pratt, 490.
McClung, 18, 260.
Scribner, 304.
Burnham v. Chandler, 252, 271.
Martin, 389.
Burnley v. Thomas, 33.
Burns v. Burns, 549.
Fox, 8.
Lynde, 21, 245.
Taylor, 427.
Thayer. 514, 515.
Burnside v. Wayman, 21, 425.
Terry, 183.
Burr v. Beers, 466.
Stenton, 309, 344, 389.
Veeder, 413
Burrell v. Letson, 232.
Burrill v. Nahant Bank, 236.
Burt v. Timmons, 36.
Burton v. Boyd, 205.
Martz, 271.
Reeds, 159.
Burtonshow v. Gilbert, 549.
Burwell v. Jackson, 344.
Busey v. Reese, 56, 76.
Bush v. Bush, 550.
Cooper, 173, 443, 483.
Cushman, 472.
Golden, 283.
Lathrop, 472.
Sherman, 458, 512.
Bussey v. Gross, 26.
Bussing v. Crain, 274.
Bussman v. Grauster, 314
Butcher v. Rodgers, 59, 171.
Yocum, 281.
Butler v. Butler, 37, 416.
Gale, 167.
Haskell, 9.
Huestis, 570.
Ladue, 458, 496.
Roys, 31.
Stevens, 280, 281. 283.
Stratten, 576.
Butterfield v. Beall, 230.
Farnham, 459.
Hamant, 571.
Bybee v. Hageman, 88.
Byers v. McClanahan, 205.
Byington v. Moore, 208.
Byles v. Tome, 471.
Bynum v. Rogers, 449.
Byrane v. Rogers, 336.
Byrd v. Curlin, 36.
Ludlow, 95.
Byrne v. Becker, 36.
Rich, 175.
Byron v. May, 502.

C.

C., C. & I. Ry. Co. v. Coburn, 124.
Cabeen v. Brekenridge, 280.
Cabot v. Haskins, 6.
Caddell v. Allen, 246.
Cadmus v. Fagan, 167.
Cadman v. Lubbock, 184.
Peter, 416.
Cadwallader v. App, 4, 6.
Cady v. Shepherd, 31.
Cagger v. Lansing, 226.
Cahill v. City Mut. Assn. 254.
Caho v. Endress, 27,
Cahoon v. Laffan, 478.
Caldwell v. Bower, 170.
Caldwell 571.
Fraim, 425.
Fulton, 270.
Head, 256.
Kirkpatrick, 168.
Calhoun v. Paducah R. R., 438.
Callard v. Matthews, 443.
Callaway v. Fash, 260.
Calloway v. People's Bank of Bellefontaine, 512.
Calmes v. Buck, 85.

Calumet, etc. Co. v. Russell, 260, 263.
Calvert v. Bradley, 370.
Calvo v. Davis, 466.
Camarillo v. Fenlen, 388.
Cambell v. Macomb, 450.
Worthington, 415.
Cambridge Valley Bank v. Delano, 74, 277.
Cameron v. Mason, 427.
Camp v. Wood 353.
Campau v. Godfrey, 31.
Campbell v. Baldwin, 427.
Dearborn, 416, 417.
Johnson, 87, 88, 155.
Lewis, 348.
Logan, 542.
Swan, 513.
Thomas, 226.
Whitson, 36.
Canal Commissioners v. The People, 105.
Candee v. Burke, 512.
Canedy v. Marcy, 89.
Canfield v. Ford, 327.
Shear, 465.
Cannon v. Cannon, 204, 205.
Collins, 8.
Handley, 223.
McNab, 414.
Canton v. Dorchester, 36.
Capal v. McMillan, 154.
Cape Girardeau Co. v. Harbison, 497.
Cardwell v. Perry, 33.
Carey v. Baughn, 553.
Daniels, 165.
Carlton v. Carlton, 542.
Jackson, 487.
Carman v. Pultz, 490.
Carnall v. Duval. 443, 445.
Carnes v. Platt, 208, 213.
Carpenter v. Boulden, 571.
Bowen, 401, 408.
Carpenter, 411.
Denoon, 557.
Dexter, 251, 252, 257, 259, 260, 265.
Logan, 472.
Muren, 36.
Thompson, 309.
Washington Ins. Co., 452.
Williamson, 59.
Carr v. Breese, 37.
Carr, 416.
Elliott, 354.
Hoobs, 427.
Holbrook, 415.
Hoxie, 211.
Rising, 425.
Carrick v. French, 225.
Carrodine v. O'Connor, 508.
Carroll v. Ballance, 411.
East St. Louis, 33.
Carskaddon v. Kennedy, 6
Carson v. McCaslin, 114.
Carstairs v. Taylor, 353.
Carswell v. Lovett, 33.
Carter v. Abshire, 513.
Bennett, 471.
Burr, 173, 357, 485.
Carter, 416.
Champion, 252.
Chandron, 196.
Corley, 201.
Hammett, 375.
Holman, 425.
Jackson, 201.
Reddish, 571.
Rockett, 452.
Shorter, 4.
Taylor, 395, 487.
Thomas, 550.
Cartwright v. Gardiner, 340.
Caruthers v. Humphrey, 483.
Carver Mer. Co. v. Hulme, 33.
Carver v. Jackson, 73, 208.
Casad v. Hughes, 353.
Casady v. Bosler, 509.
Casborne v. Scarfe, 401.
Case, *Re*, 512.
Case v. Case, 29.
Devise, 125.
Mercer Street, 173.
Cashman v. Henry, 27.
Cason v. Murray, 36.
Cassidy v. Carr, 238.
Caton, 445.
Castigan v. Gould, 65.
Castner's Appeal, 571.
Castro v. Castro, 557.
Caswell v. Wendell, 177.
Cates v. Woodson, 26.
Catheart v. Bowman, 166.
Catlett v. Catlett, 541.
Catlin v. Chrittendon, 415.
Gilden, 31.
Hurlburt, 164, 165.
Ware, 68, 181.
Catsby's Case, 380.
Caufman v. Sayre, 496.
Cavender v. Smith, 260.
Cecil v. Beaver, 109, 205, 212, 214.
Cedar Rapids, etc. R. Co. v. Stewart, 234
Center v. P & M. Bank, 279, 471.
Central Bank v. Copeland, 263.
Central Trust. Co. v. Wabash, St. L. & P. R., 409.
Chadwell v. Davis, 104.
Chadwick v. Parker, 336, 382.
Chaires v. Brady, 416.
Chalker v. Chalker, 382.
Challoner v. Davis, 386.
Chamberlain v. Barnes, 472.
Bell, 292
Ewer, 164.
Lyell, 181.
Meeder, 483.
Thompson, 146, 407, 411.
Chambers v. Sallie, 37.
Ala. Iron Co., 8.
Champion v. Brown, 9.
Pulle, 6.
White, 5.
Champlain Railroad v. Valentine, 104.
Champlin v. Parish, 7, 230.
Williams, 467.
Champney v. Coope, 491.
Chandler v. Brown, 168.
Cook, 512.
Spear, 259.
Temple, 213.
Van Roeder, 36.
Chapel v. Bull, 166, 176.
Chapin v. First Universalist Soc., 31.
Pease, 36.
Chapman v. Armistead, 472.
Bluck, 304, 305.
Crooks, 68, 73.
Harvey, 336.
Hunt, 486.
Kimball, 166.
Kirby, 335, 336.
McGrew, 371.
Pingree, 124.
Sims, 285.
Summerfield, 36.
Tanner, 427.
Chappell v. Allen, 471.
Charles v. Patch, 88.
Charles River Bridge v. Warren Bridge, 99.

Chase v. Abbott, 485.
Brown, 472.
Kittredge, 541, 512.
McLellan, 501.
Palmer, 21, 67, 502.
Peck, 415, 425, 427.
Weston, 162.
Woodbury, 481.
Chatham v. Bradford, 291.
Chauncey v. Arnold, 21.
Chauvin v. Wagner, 173.
Cheesebrough v. Millard, 481, 492.
Cheetham v. Hampson, 345.
Cheever v. Perley, 486, 497.
Rutland, etc. R. R., 408.
Cheney v. City Nat. Bank, 167.
Stevens, 57.
Watkins, 76, 78, 252.
Cherry v. Bowen, 415.
Herring, 224.
Monro, 465, 466.
Cheseman v. Exall, 36.
Chesley v. Chesley, 513.
Frost, 20.
Chessman v. Whittemore, 20.
Chew v. Bank of Baltimore, 26.
Chicago Dock Co. v. Kinzie, 182.
Chick v. Rollins, 486, 497.
Willets, 409, 497.
Child v. Sampson, 312.
Childers v. Deane, 449.
Children's Aid Society v. Loveridge, 542.
Childs v. Clark, 277.
Dobbins, 25.
Chiles v. Couley's Heirs, 26, 60.
Chiniqua v. Catholic Bishop of Chicago, 257.
Chipman v. Emeric, 361.
Chittenden v. Barney, 479.
Ger. Am. Bank, 31.
Choate v. Burnham, 118.
Chouteau v. Thompson, 443.
Jones, 271.
Chouquette v. Barada, 197.
Chowner's Will, *In re*, 423.
Chrisman v. Partee, 9.
Hahn, 207.
Keen, 27.
Christian v. Newberry, 473.
Badger, 574.
Christy v. Bernhart, 8.
Dana, 448, 503.
Church v. Cole, 416.
Gilman, 211, 214.
Remington, 33.
Churchhill v. Morse, 287.
Wells, 37.
Cicotte v. Gagnier, 472.
Cilley v. Cilley, 542.
Cincinnati R. Co. v. Iliff, 208, 224.
City of Alton v. Ill. Transportation Co., 100, 108.
City of St. Louis v. Bissall, 176.
City Bank v. McClellan, 204.
Claflin v. Mess, 37.
Claiborne v. Holmes, 272.
Clamorgan v. Hornsby, 108.
Clampet v. Bells, 4.
Clap v. McNeil, 173.
Clark v. Abbott, 407.
Akers, 65, 204.
Allen, 21.
Babcock, 344, 353.
Baker, 73, 448.
Beach, 407.
Clark, 8, 27, 33.
Conroe, 170.
Coolidge, 358.
Courtney, 246.
Eborn, 549.
Clark v. Finlon, 415, 116.
Flint, 472.
Graham, 230.
Harvey, 297.
Hornthal, 154.
Hunt, 427.
Lyon, 414.
McGeihan, 32.
Morris, 280.
Mosely, 571.
N. Y. Life Ins. Co., 5.
Potter, 477.
Powers, 88.
Redman, 182.
Reyburn, 501, 502.
Scammon, 106, 107.
Smith, 549, 571.
Swift, 164, 166.
Troy, 76, 251.
Clarke v. Cummings, 382.
McAnulty, 170.
Monroe, 182.
Ransom, 548.
Clarkson v. Creely, 511.
Clason v. Bailey, 6, 7.
Clawson v. Munson, 443.
Clay v. Wren, 453.
Claycomb v. Munger, 162, 168, 170.
Clayton v. Brown, 37.
Merrett. 242.
Rose, 260.
Cleavenger v. Beath, 444.
Clement v. Baush, 31.
Bennett, 414.
Clements v. Ewing, 27.
Landrum, 79.
Cleveland v. Choate, 108.
Boerum, 154.
Martin, 415.
Southard, 465.
Cleves v. Willoughby, 357.
Clifford v. Atl. Cotton Mills, 353.
Parker, 19.
Clift v. White, 383.
Clinan v. Cooke, 8.
Cliner v. Wallace, 108.
Clingan v. Mitcheltree, 550.
Clinton v. Westbrook, 411.
Clopton v. Bolton, 174.
Cloud v. Greasley, 3.
Clough v. Clough, 21.
Clove v. Graham, 173.
Clute v. Robinson, 472.
Coal Co. v. Pasco, 260.
Cobb Estate, 559.
Coburn v. Goodall, 348.
Herrington, 260.
Litchfield, 176.
Cocheco Mfg. Co. v. Whittier, 99.
Cochran v. Guild, 167.
Cocke v. Bailey, 5.
Brogan, 309.
Cockrell v. Proctor, 165, 173, 175.
Cockrill v. Armstrong, 146.
Cockson v. Cock, 348.
Coddington v. Dunham, 344.
Codman v. Hall, 314.
Codogan v. Kennett, 36.
Coffey v. Hunt, 407, 453.
Coffin v. Loring, 445.
Ray, 288.
Coffman v. Huck, 177.
Scoville, 166.
Cogan v. Cogan, 128.
Cogdell v. Cogdell, 553.
Cohen v. Dupont, 357.
Cohoes Company v. Goss, 511.
Coit v. Braunsdorf, 376.
Coker v. Pearsale, 407.
Pearsall, 377.

Colbern v. Robinson, 36.
Colburn v. Morrill, 389.
Colby v. Kenniston, 280, 364.
McOmber, 280.
Osgood, 172.
Colcord v. Alexander, 4.
Cole v. Cole, 26.
Edgerly, 470.
Hills, 19.
Long, 190.
McKey, 353.
Moffitt, 511.
Patterson, 339.
Pennoyer, 25.
Persons, 59.
Potts, 8.
Raymond, 169.
Savage, 465.
The Columbus, etc., 425.
Coleman v. Barklew, 280.
Haight, 353.
Lyman, 164.
Maberly, 387.
Van Rensselaer, 435.
Coles v. Soulsby, 79.
Treeothick, 7.
Wooding, 101.
Collamer v. Kelley, 369.
Langdon, 485.
Collier's Will, 155.
Collier v. Gamble, 165, 173.
Collins v. Boyd, 261.
Hasbrouck, 369.
Hoxie, 576.
Karatopsky, 357.
Lavelle, 83.
Marcy, 122.
Prentice, 93.
Riggs, 479.
Torry, 315, 486.
Tillon, 416.
Colman v. Duke of St. Albans, 407.
Packard, 453.
Colomer v. Morgan, 271.
Colquhoun v. Atkinson, 65.
Colt v. Colt, 577.
Colton v. Seavy, 218.
Columbet v. Pacheco, 102.
Columbia Ins. Co. v. Lawrence, 452.
Columbian Building Association v. Crump, 483.
Colwell v. Woods, 414.
Warner, 478.
Comer v. Baldwin, 206, 207.
Comerford v. Cobb, 195.
Comings v. Little, 176.
Commercial Bank v. Norton, 232.
Commonwealth v. Hanlon, 8.
Jackson, 207, 214.
McClanachan, 163.
Rodes, 271.
Roxbury, 91.
Williams, 33.
Comstock v. Comstock, 165.
Hadlyme Society, 542.
Smith, 169, 171.
Concord Bank v. Bellis, 27.
Condit v. Baldwin, 449.
Conger v. Duryea, 382.
Congleton v. Pattison, 350.
Conklin v. Hinds, 271.
Conlon v. Grace, 15, 190, 200, 206.
Conn v. Manifee, 271.
Connecticut v. Bradish, 288.
Jackson, 449.
Conn. Mut. Life Ins. Co. v. Talbot, 471.
Connelly v. Skelly, 221.
Conner v. McMurray, 181.
Connery v. Brooke
Connor v. Eddy, 448.
McMurray, 183.
Conover v. Warren, 427.
Conrad v. Druid's Grand Grove, 175.
Constantine v. Wake, 369.
Contant v. Servess, 492.
Conaway v. Sweeney, 7.
Conway v. Alexander, 417.
Conwell v. Evill, 416.
Cooch v. Gerry, 407.
Coogan v. Parker, 353.
Cook v. Barr, 146.
Brightly, 473.
Brown, 205, 225.
Finkler, 477.
Hall, 274.
Johnson, 174.
Knott, 256.
Knowles, 204.
Moore, 28.
Parham, 486.
Tombs, 25.
Cookes v. Culbertson, 416.
Cool v. Peters, 3.
Cooley v. Warren, 95.
Coolidge v. Melvin, 37.
Coombe's Case, 253.
Coombes v. Thomas, 260.
Coombs v. Warren, 451.
Coon v. Browning, 284.
Brickett, 240.
Cooney v. Hayes, 370.
Cooper v. Cooper, 33.
Davis, 407, 450.
Foss, 466.
Jackson, 207, 208.
Newland, 470, 471.
Page, 21.
Ulmann, 471.
Whitney, 417.
Cope v. Alden, 449.
Meeks, 27.
Copenrath v. Kienly, 26.
Copland v. Parker, 361.
Coquillard v. French, 236.
Corbett v. Norcross, 201.
Waterman, 466.
Woodward, 472.
Corbin v. Healy, 114.
Corbit v. Smith, 29.
Sullivan, 278.
Corcoran v. Powers, 449.
Corley v. Corley, 205.
Corlies v. Howland, 427.
Cormerais v. Genella, 413, 508.
Cornell v. Andrews, 59.
Hall, 417.
Cornish v. Bryan, 472.
Cornog v. Fuller, 471.
Cornwell v. Cornwell, 4.
Corradine v. O'Connor, 502.
Corwin v. Corwin, 56.
Coryell v. Dunton, 155.
Cosby v. Ross, 37.
Cossitts v. Hobbs, 4.
Costigan v. Gould, 65.
Cotrell v. Adams, 470.
Long, 416.
Cotterell v. Long, 415.
Purchase, 414, 422.
Cottle v. Young, 104.
Couch v. Ingersoll, 174.
Conlson v. Holmes, 550.
Counden v. Clerke, 67.
County of Henry v. Bradshaw, 65.
Courand v. Vallmer, 193.
Covenhoven v. Shuler, 570.
Covey's Will, 541.
Cowell v. Colorado Springs R. Co. 33, 122.

Cowen v. Alsop, 37.
Cox v. Cox, 4.
Henry, 176.
Hoxie, 443.
Louisville, etc. R. R. Co., 104.
Palmer, 19.
Wayt, 271, 279.
Coy v. Downie, 357.
Coyle v. Davis, 492.
Cozzen's Will, 541.
Craddock v. Aldrige, 174.
Crafts v. Crafts, 444.
Dougherty, 510.
Cralg v. Pinson, 57.
Wells, 118.
Cramer v. Benton, 88.
Lepper, 465.
Crance v. Collenbaugh, 170.
Crane v. Bonnell, 417.
Crane, 263.
DeCamp, 415.
March, 470, 472.
Reeder, 200.
Turner, 472.
Cranston v. Crane, 513, 515.
Crassen v. Swoveland, 414.
Crawford v. Bertholf, 205.
Chapman, 339.
Edwards, 465, 466.
Jarrett, 5.
Kastine, 354.
Kirksey, 37.
Taylor, 477, 497.
Crawley v. Mullins, 333.
Creely v. Ostrander, 574.
Creighton v. McKee, 354.
Creigh v. Boggs, 9.
Crescent City Wharf Co. v. Simpson, 366.
Cresinger v. Welch, 25.
Crinion v. Nelson, 470.
Crisfield v. Storr, 177.
Crittenden's Est., 542.
Crittendon v. Brainard, 477.
Crocker v. Hill, 353.
Pierce, 169.
Robertson, 508.
Crockett v. Maguire, 278.
Croft v. Bunster, 471, 472.
Powel, 458.
Crofut v. Wood, 74.
Cromelin v. Thiess, 361. 370.
Cromer v. Pinckney, 575.
Cromie v. Hoover, 362.
Cromwell v. Tate, 180, 195.
Winchester, 85.
Crooker v. Holmes, 497.
Jewell, 486.
Crooks v. Crooks, 205, 211.
Crosby v. Chase, 491.
Harlow, 407.
Loop, 370.
Leavitt, 600.
Wendell, 570.
Cross v. Carson, 124.
Everts, 183.
Robinson, 407, 411, 448, 483.
Crouch v. Fowle, 173.
Crouse v. Holeman, 26.
Crow v. Beardsley, 36.
Vance, 471, 472.
Crowe v. Peters, 29.
Crowell v. Curier, 466.
Gleason, 28.
Crowley v. Wallace, 210.
Croxall v. Shererd, 58.
Crumbly v. Barden, 491.
Cruger v. McLaury, 331, 339.
Cruikshank v. Duffin, 423.
Crump v. Morrill, 357.
Crusoe v. Bugby, 369.
Crutchfield v. Donathan, 1, 6.
Crystie v. Phyfe, 570.
Cubberly v. Cubberly, 5.
Cullum v. Erwin, 471.
Culpepper Society v. Digges, 69.
Culver v. Bigelow, 449.
Cumberland Coal & Iron Co. v. Parish 472.
Cummings v. Cassily, 31.
Dearborn, 111.
Dennett, 4.
Holt, 167.
Powell, 25.
Cunningham, *In re*, 548.
Curtis, 101.
Freeborn, 77.
Knight, 182.
Morrell, 174.
Pattee, 354.
Robertson, 102.
Curlin v. Hendricks, 9.
Currie v. Donald, 61.
Currier v. Gale, 483.
Curtis v. Deering, 170.
Mundy, 281.
Root, 289.
Valiton, 36.
Curyea v. Berry, 289.
Cushing v. Hurd, 272, 288, 370,
Cushman v. Henry, 27.
Stone, 416, 510, 512.
Cushwa v. Cushwa, 36.
Cutler v. Callison, 102.
Dickinson, 414, 415.
Haven, 470, 490.
James 385.
Tufts, 118.
Cutsinger v. Ballard, 8.
Cutter v. Butler, 525.
Griswold, 37.
Cutts v. York Co., 204, 213.

D.

Dadmun v. Lamson, 470.
Dagget v. Rankin, 425.
Daggett v. Daggett, 223, 226.
Willey, 101.
Dail v. Moore, 259.
Daily v. Grimes, 365.
Dailey v. Litchfield, 9.
Dakin v. Williams, 340.
Dale v. Arnold, 273.
Harrison, 36.
Lincoln, 32.
Shiverly, 1 4, 175.
Thurlow, 249.
Dalton v. Bowker, 177.
Dame v. Wingate, 24.
Dana v. Combs, 25.
Farrington, 511, 512, 513.
Danbury v Robinson, 472.
Daniels v. Bailey, 3.
Danzey v. Smith, 36.
Danziger v. Boyd, 101.
Darby v. Hayford, 26.
Darling v. Chapman, 483.
Darst v. Bates, 65, 204.
Gale, 256.
Murphy, 416.
Dartmouth College v. Clough, 313.
Daub v. Englebache, 466.
Daubenspeck v. Platt, 417.
Davar v. Cardwell, 260.
Davey v. Durrant, 511.
Turner, 182.
David v. Burchard, 36.
Ryan, 362.
Rickabaugh, 271.
Davie v. McDaniel, 287.

Davis v. Agnew, 260.
Andrews, 27.
Bartholomew, 181, 182.
Bogle, 260.
Brandon, 193.
Brewster, 416.
Burton, 31, 196.
Clay, 415.
Culver, 26, 29
Demming, 415, 416, 417.
Dresback, 477.
Fox, 28.
Gerber, 3.
Hamilton, 425.
Holmes, 502.
Judge, 102.
Luster, 28.
Morris, 369.
Moss, 382.
Ownsby, 274, 287, 289.
Rogers, 504.
Shields, 6, 15, 16, 540.
Smith, 177.
Speed, 56.
Thomas, 417.
Davison v. Stanley, 387.
Dawkins v. Patterson, 516.
Dawson v. Burnes, 183.
Dawson, 212, 520.
Helmes, 25.
McFaddin, 8.
Smith, 549.
Day, *Ex parte*, 546.
Day v. Adams, 170, 200.
Watson, 357.
Dayton v. Newman, 205.
Deakins v. Hollis, 547.
Dean v. Dean, 542.
Mason, 5.
Walker, 466.
Dearborn v. Taylor, 471.
De Arguelle v. Bours, 21.
Dearmond v. Dearmond, 222.
De Camp v. Crane, 415.
Decatur v. Walker, 473.
Decker, *Ex parte*, 21.
Deery v. Gray, 88.
DeForest v. Byrne, 360.
DeFrance v. DeFrance, 416.
Dehority v. Wright, 166.
Deininger v. McConnel, 274.
Dela v. Stanwood, 480.
Delacey v. McKeen, 271.
Delafield v. Brady, 260.
Parish, 549.
Delahay v. McConnel, 415.
Delancey v. Ganong, 388.
Delane v. Moore, 273.
Delaney v. Sullivan, 526.
Delano v. Bennett, 471.
Wilde, 407.
DeLeon v. Higuera, 429.
Demainville v. Wann, 376.
Demarest v. Willard, 347, 348, 370.
Wynkoop, 477.
Demesmey v. Gravelin, 226.
Demeyer v. Legg, 104.
Deming v. State, 443.
Demming v. Bullett, 180.
Comings, 485.
Den v. Drew, 580.
McMurtrie, 582.
Snitcher, 580.
Dening v. Billett, 195.
Dennett v. Dennett, 26.
Dennis v. Wilson, 119.
Denster v. McCamus, 492.
Denton v. Perry, 208, 212.
Deordorff v. Forman, 211.
DePeyster v. Michael, 361.
Deputy v. Staplefordf, 28.
Dermott v. Wallach, 382.
Derrick v. Kennedy, 25.
Derry Bank v. Webster, 208, 212.
Desvergers v. Willis, 167.
Detrick v. Sharrer, 8.
Detroit F. & M. Ins. Co. v. Aspinwall, 487.
Deu v. Dimon, 470.
Hanks, 56, 77, 78.
Helmes, 112.
Johnson, 364.
Lamshee, 312.
Richman, 287.
DeVaux v. Fosbender, 235.
Devechaud v. Berrey, 33.
Devin v. Himer, 21.
Devinney v. Reynolds, 245, 264.
Devore v. Sunderland, 164, 165.
Dewey v. Williams, 124.
DeWitt v. Moulton, 252, 271.
Pierson, 357.
DeWolf v. Johnson, 465.
Dexter v. Arnold, 480.
Harris, 276
Manley, 173.
Shepard, 512, 513, 514.
Dey v. Dunham, 281.
Dice v. Irwin, 36.
Dick v. Mowry, 471.
Dickenson v. Dickenson, 540.
Jackson, 429.
Dickerson v. Davis, 260.
Dickey v. Malechi, 549.
Powell, 503
Vann, 558.
Western, 165.
Dickie v. Carter, 542.
Dickinson v. Hoomes, 162, 168.
McLane, 183.
Dickson v. Desire, 164, 175.
Dickson, 540.
Dietrich v. Koch, 36.
Diez's Will, 541.
Digges' Case, 157.
Dill v. Satterfield, 458, 510.
Dillon v. Brown, 314.
Dilworth v. Rice, 560.
Dimmick v. Lockwood, 176, 177.
Dimond v. Enoch, 414.
Dingman v. Kelly, 327.
Dinsmore v. Winegar, 4.
Diver v. Diver, 33.
Dixon v. Buell, 371.
Niccolls, 370.
Rice, 9.
Saville, 407.
Dix v. Atkins, 304.
D'Meza v. Generes, 443.
Dobbs v. Norcross, 9.
Dobell v. Hutchinson, 4.
Dobson v. Land, 452.
Racey, 514.
Dodd v. Acklom, 387.
Adams, 37.
Dodge v. Brewer, 484.
Dodge, 20.
Hollinshead, 263.
Doe v. Allen, 360.
Bancks, 382.
Benjamin, 304.
Bliss, 340, 382.
Catamore, 19.
Cavendish, 152.
Cross, 520.
Dey, 324.
Heirst, 20.
Hogg, 361.
Horn, 76.
Jackman, 575.
Knight, 213.

Doe v. Lancashire, 551.
Lock, 118.
McLoskey, 407.
Passingham, 137.
Peck, 348.
Pearson, 125.
Phillips, 382.
Reed, 49, 260, 285.
Reynolds, 388.
Rice, 305.
Roe, 542.
Seaton, 350.
Shewin, 359.
Smith, 10.
Stevens, 337.
Tupper, 31.
Vallejo, 449.
Warren, 449.
Doherty v. Hill, 5, 7.
Dolde v. Vodicka, 108.
Dollman v. Harris, 183.
Dolph v. White, 357.
Donelson v. Pasey, 30.
Donlin v. Bradley, 491.
Donnell v. Thompson, 164.
Donohue v. Mills, 260.
Dooley v. Wolcott, 280.
Watson, 9.
Doolittle v. Lewis, 458, 508.
Dooper v. Noelke, 79.
Dorkray v. Noble, 470, 484.
Dorland v. Dorland, 151.
Dorr v. Peters, 465.
Dorrance v. Jones, 370.
Dorsey v. Smithson, 36.
Dos Santos v. Hollinshead, 387.
Dostal v. McCaddon, 362.
Doton v. Russell, 483.
Doty v. Burdick, 376, 388.
Doubleday v. Kress, 478.
Dougherty v. McColgan, 417.
Randall, 471.
Douglas v. Bank, 69.
Fulda, 388.
Scott, 73.
Douglass v. Cross, 464.
Wells, 466.
Doupe v. Genin, 344, 353.
Douthitt v. Stinson, 69.
Dow v. Jewell, 19, 27.
Lewis, 84.
Moor, 496.
Dower v. Seeds, 549.
Smith, 165.
Downer v. Button, 471.
Miller, 493.
Smith, 59.
Wilson, 479
Downie's Will, 542.
Downing v. Marshall, 154.
Doyle v. Coburn, 183.
Howard, 511.
Lord, 327.
Teas, 281.
White, 444,
Dozier v. Barnett, 271.
Drake v. Root, 183.
Ramsey, 25, 310.
Drane v. Gunter, 508.
Draper v. Bryson, 287.
Stouvenal, 312.
Dreutzer v. Baker, 195.
Drew v. Rust, 487.
Swift, 101.
Wakefield, 575.
Driesbach v. Serfass, 520.
Drinan v. Nichols, 511.
Driscoll v. Green, 98.
Driver v. Maxwell, 353.
Drown v. Smith, 56.
Drum v. Painter, 36.
Drury v. Foster, 21.
Tremont, etc., Co., 79.
Young, 6.
Drye v. Cook, 256.
Dublin v. Chadbourn, 600.
Dubose v. Young, 274, 289.
Ducia v. Ford, 8.
Ducland v. Rosseau, 409.
Dudley v. Bergen, 493.
Duer v. James, 205.
Duff v. Hopkins, 9.
Duffie v. Corridon, 541, 542.
Dugan v. Corn, 27.
Duke v. Balme, 427.
Codrington, 466.
Duke, 33.
Dukes v. Spangler, 205.
Dulaney v. Green, 30.
Dumpor's Case, 340.
Duncan v. Beard, 559.
Duncan, 261, 554.
Drury, 473.
Hodges, 18, 21.
Helm, 449.
Pope, 224.
Sylvester, 31.
Duncan's Appeal, 37.
Dandas v. Bowler, 469.
Dunham v. Averill, 571, 574.
Gould, 449.
Minard, 486.
Dunker v. Chedic, 183.
Dunklee v. Wilton R. R. Co., 91, 93.
Dunlap v. Bullard, 369.
Daugherty, 257.
Thomas, 182.
Dunn v. Bagly, 344.
Games, 70.
Rayley, 425.
Seymour, 472.
Dupont v. Wertheman, 237.
Duppa v. Mayo, 336, 382.
Durbin v. Garrard, 177.
Duryea v. Duryea, 551.
Dustin v. Steele, 182.
Dussaume v. Burnett, 252. 256.
Dutton v. Gerrich, 344.
Ives, 472.
Stuart, 182.
Warschauer, 409.
Durinel v. Bliss, 204.
Dwinel v. Perley, 39, 469, 470, 471.
Dwiggins v. Shaw, 174.
D'Wolf v. Hayden, 173.
Dye v. Mann, 183.
Dyer, *In re*, 540.
Britton, 170.
Sanford, 119.
Shurtleff, 511, 512, 514.
Toothaker, 483.
Dyson v. Bradshaw, 226.

E.

Eacho v. Cosby, 443.
Eagle Fire Ins. Co. v. Pell, 443.
Earle v. Earle, 222.
Fiske, 286.
Hale, 388.
Earuest v. Hoskins, 472.
Early v. Owens, 37.
Eastman v. Thayer, 480.
Eason v. Eason, 8.
East Norway, etc., Church, v. Frolsie, 33.
Easton v. Mitchell, 323.
Jaques, 370, 409.
Lyman, 176.
Perry, 39, 312.
Smith, 5, 88.

Simonds, 478, 480.
Trowbridge, 204.
Whitaker, 312.
Ebert v. Wood, 102.
Eby v. Eby, 575.
Echols v. Cheney, 246.
Eeke v. Fetzer, 348, 362.
Eekman v. Eckman, 43, 55, 60, 208.
Edger v. Edger, 526.
Edgerton v. Jones, 263.
Page, 357.
Thomas, 233.
Young, 470, 473.
Edgington v. Hefner, 492,
Edmondson v. Welsh, 514.
Edward's Appeal, 551.
Edwards v. Brinker, 271, 279.
Bibbe, 570.
Davis, 312.
Haverstick, 36.
N. Y. & H. R. Ry. Co., 353.
Poys, 24.
Schoeneman, 27.
Trumbull, 426.
White County, 102.
Ege v. Ege, 331.
Eggleston v. Bradford, 87.
Ehle v. Brown, 280.
Eisaman v. Gallagher, 478.
Edler v. Hasche, 464.
Ela v. Edwards, 542.
Elder v. Lantz, 571.
Eldred v. Leahy, 357.
Eliott v. Carter, 93, 571.
Barrett, 3.
Elkins v. Edwards, 497.
Ellet v. Richardson, 27.
Ellinger v. Crowe, 76.
Elliott v. Aiken, 344, 353.
Carter, 582.
Patton, 478.
Sockett, 464.
Sleeper, 68.
Wood, 458, 459, 501.
Ellis v. Alford, 25, 27.
Ellis v. Essex, 575.
Johnson, 466.
Lindley, 493.
Page, 535.
Welch, 352.
Ellison v. Daniels, 407, 471.
Wilson, 279.
Ellsworth v. Central R. R. Co., 65, 204.
Elmendorf v. Lockwood, 182.
Elmore v. Marks, 208, 212.
Elsey v. Metcalf, 65, 211, 212.
Elwell v. Shaw, 246, 253.
Ely v. Adam, 5.
Ely, 19, 500, 571.
Hair, 31.
Scofield, 471.
Stannard, 59.
Wilcox, 252, 271, 278, 280.
Emanuel v. Hunt, 471.
Embury v. Connor, 278.
Emerson v. Atwater, 416.
Bemis, 37.
Proprietors, 168.
Providence Hat Manf. Co., 232.
Emerson v. Wiley, 173.
Emery v. Chase, 55.
Emmert v. Hays, 571.
Emmons v. Murray, 280, 281.
Endel v. Walls, 443.
Endsley v. Strock, 71.
English v. Key, 377.
Roche, 438.
Russell, 427.
Young, 50.
Ennis v. Harmony Fire Ins. Co., 452.
Pentz, 575.
Enston v. Friday, 443.
Episcopal City Mission v. Appleton, 126, 128.
Eppes v. Randolph, 36.
Eppich v. Clifford, 4.
Epps v. Dean, 550.
Erickson v. Rafferty, 411.
Erskine v. Davis, 67, 70.
Townsend, 395, 407, 476, 483.
Eslava v. Lepretre, 182.
Estabrook v. Hateroth, 388.
Moulton, 445.
Smith, 167, 170.
Estep v. Estep, 344.
Morris, 542.
Estevez v. Purdy, 449.
Esty v. Baker, 373.
Esmay v. Gorton, 6.
Eten v. Lyster, 313, 375.
Evans v. Arnold, 559.
Bidwell, 388.
Evans, 548.
Gibbs, 225.
Evans v. Hardeman, 2.
Horan, 26, 28.
Huffman, 486.
Kimball, 473.
Lee, 458.
McGlasson, 287.
Smith, 520.
Templeton, 290.
Wells, 7.
Everston v. Kan. Cent. Bank, 487.
Everts v. Agnes, 226.
Everett v. Everett, 205.
Diley, 8.
Everhart v. Everhart, 541.
Everman v. Robb, 438.
Ewer v. Hobbs, 411.
Ewing v. Burnett, 93.
Ewing's Appeal,
Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool, 452.
Exchange Bank v. Rice, 331.
Decker, 21.
Kerwin, 21.
Reynal, 438.
Sultar, 7.
Exum v. Canty, 55, 60, 76, 73.
Eyre v. Storer, 532.
Eyster v. Hatheway, 263.
Ezzel v. Watson, 514.

F.

Fagan v. Cadmus, 167.
Fahey v. Marsh, 102.
Fain v. Smith, 205.
Fair v. Stevenot, 280, 281.
Fairbanks v. Metcalf, 204, 224, 227.
Faley v. Bitter, 37.
Falkner v. The Equitable Reversionary Soc., 513.
Fall v. Hazelring, 8.
Roper, 260.
Fallass v. Pierce, 284, 288.
Falley v. Giles, 354.
Fanning v. Kerr, 508.
Farley v. Carpenter, 36.
Thompson, 377.
Parker, 26.
Farmer's Bank v. Douglass, 472.
Glenn, 175.
Haight, 194.
Warner, 36.
Farmers' etc. Co. v. Edwards, 488.
Farmers' Insurance Co. v. Harrah, 33.
Farmers' Loan Co. v. McKinney, 33, 59.

Farmers' Loan & Trust Co. v. Hughes, 458.
Farnell v. Lowther, 6.
Farnum v. Buffum, 261.
Burnett, 443.
Peterson, 24.
Farquharson v. Eichelberger, 111.
Farrar v. Bridges, 205.
Stackpole, 94.
Farrell v. Parlier, 478, 502.
Farris v. Gilbert, 87.
Fash v. Blake, 285.
Fassett v. Smith, 493.
Faure v. Winans, 443.
Faulknar v. Brockenbrough, 411.
Fauntleroy v. Dunn, 50.
Farwell v. Rogers, 380.
Faxon v. Folvey, 39.
Fay v. Cheney, 407.
Richardson, 207.
Valentine, 477.
Winchester, 238.
Fedler v. Darrin, 449.
Feit v. Vanatta, 575.
Feldman v. Gamble, 443.
Felker v. Emerson, 233.
Fellows v. Allen, 551.
Dow, 472.
Fellows, 222.
Smith, 79.
Felton v. Smith, 8.
Fenner v. Tucker, 512.
Fenno v. Sayre, 278, 288.
Fenton v. Lord, 466.
Fenwick v. Floyd, 88.
Ferguson v. Bell, 25.
Ferguson, 508.
Kimball, 508
Kingsland, 253.
Popp, 484.
Wagner, 484.
Watson, 56.
Ferreira v. Depew, 236.
Ferrier v. Buzick, 9.
Ferris v. Hendrickson, 472.
Ferris, 445.
Fetrow v. Merriweather, 56.
Fewell v. Kessler, 208.
Fidler v. Lash, 585.
Field v. Columbet, 59, 60, 106.
Gooding, 515.
Herrick, 352
Mills, 337, 361, 369.
Stagg, 21.
Wilson, 497.
Fifty Associates v. Howland, 127, 336.
Final v. Backus, 258.
Finch v. Finch, 557.
Fink v. Denny, 37.
Finlay v. Spratt, 272.
Finley v. Simpson, 61.
Fipps v. McGehee, 260.
First Nat. Bank v. Ashmead, 416.
Bell Mining Co., 512.
Caldwell, 426.
Elmore, 478.
Gay, 245.
Marlow, 443.
Thomas, 497.
Fish v. French, 472.
Leser, 9.
Fisher v. Banta, 536.
Beckwith, 21.
Field, 146.
Hall, 205, 207.
Kuhn, 8.
Meister, 186, 260, 263, 443.
Milmine, 407, 445, 496.
Otis, 471.
Fisk v. Brunette, 451.
Flores, 74.
Potter, 427.
Stubbs, 33.
Fiske v. McIntosh, 312.
Tolman, 464.
Fissel's Appeal, 576.
Fitch v. Boyer, 289.
Johnson, 162.
Fitchburg Manufacturing Co. v. Melven, 357, 407.
Fitton v. Hamilton City, 367.
Fitts v. Hall, 25.
Fitzgerald v. Barker, 466.
Fitzhugh v. Barnard, 283.
Croghan, 164, 165, 200.
Smith, 425.
Wilcox, 26.
Fitzpatrick v. Featherstone, 9.
Fitzpatrick, 512.
Fitzsimons v. Baum, 449.
Flagg v. Badger, 381.
Dow, 387.
Eames, 111.
Flagg, 407.
Mann, 414, 415, 417.
Thurber, 465.
Flanagan v. Young, 260.
Flanders v. Lamphear, 443, 496.
Fleckner v. Bank of the U. S., 449.
Flege v. Garvey, 183.
Fleming v. Carter, 8.
Ervin, 252.
Holt, 171.
Fleschner v. Sumpter, 272.
Fletcher v. Carpenter, 470.
Chase, 479.
Holmes, 401, 409.
Horne, 113.
Mansur, 70.
McFarland, 375.
Peck, 36.
State Bank, 167.
Wilson, 309.
Flinn v. Owen, 542.
Powers, 25.
Flint v. Shelton, 414.
Flood v. Progoff, 542.
Florence S. M. Co. v. Zeigler, 36.
Flower v. Elwood, 458, 491.
Lance, 465.
Flowers v. Wilkes, 289.
Floyer v. Edwards, 449.
Flynt v. Arnold, 288.
Fogarty v. Finlay, 260.
Sawyer, 261, 513.
Foley v. Bitter, 36.
Folk v. Varn, 83, 205, 212, 217.
Follett v. Heath, 444.
Folly v. Vantuyl, 205.
Folsom v. Lockwood, 491.
Fonda v. Jones, 427.
Sage, 20, 209, 214.
Fontaine v. Boatman's Savings Inst., 65, 79, 204.
Fonty v. Fonty, 77, 78.
Foote v. Burnet, 166, 168.
Burnett, 170, 176.
Burret, 165.
Sprague, 443, 449.
Forbing v. Weber, 549.
Force v. City of Elizabeth, 449.
Dutcher, 236
Ford v. Ford, 542, 549.
Gregory, 65, 204.
Irwin, 417.
James, 206, 222.
Smith, 427.
Teal, 263.
Fords v. Vance, 287.

Foreman v. Hoster, 27.
Forman's Will, 550.
Forman v. Forman, 449.
Forrester v. Flowers, 8.
Forsyth v. Day, 245.
Fort v. Burch, 471.
James, 221.
Fortier v. Darst, 510.
Fortune v. Buck, 600.
Watkins, 9.
Fosdick v. Barr, 471.
Fosselmain v. Elder, 543.
Foss v. Crisp, 188.
Foster v. Beals, 470.
Bearsley, 209.
Hall, 39.
Leeper, 4.
McGraw, 5.
Mansfield, 211, 225.
Paine, 485.
Peyser, 344.
Thompson, 177.
Foulke v. Stockdale, 102.
Fowle v. Merrill, 512.
Fowler v. Bott, 353.
Fay, 464.
Payne, 357.
Poling, 168.
Shearer, 27, 181, 182, 253.
Fowler v. Trebein, 32.
Fowley v. Palver, 489.
Palmer, 452.
Fox v. Hall, 285.
Nathans, 323, 380.
Foxcraft v. Lester, 8.
Foy v. Foy, 146.
France's Estate, 571.
Francis v. Barry, 4.
Porter, 496.
Wells, 427.
Franciscus v. Reigert, 23.
Frank v. Eltringtham, 4.
Maguire, 346, 375.
Peters, 36.
Franklin v. Becker, 249.
Greene, 513.
Osgood, 234, 458.
Palmer, 370.
Talmadge, 70.
Fransen's Case, 551.
Frazer v. Clifford, 27.
Davie, 206.
Robinson, 388.
Frear v. Drinker, 486.
Freed v. Brown, 26.
Freeland v. Freeland, 39.
Freeman v. Auld, 465, 466.
Boldwin, 414.
Burnham, 37.
Freeman, 8.
Foster, 167, 171.
Paul, 473.
Pope, 37.
Sedgwick, 36.
Staats, 30.
Wilson, 415, 416, 417.
French v. Baron, 480.
Burner, 415.
Burns, 415.
Peters, 182.
Sturdivant, 417.
The Mayor, 362.
Turner, 472.
Frey v. Clifford, 284, 287.
Frierson v. Blanton, 476.
Frieze v. Chapin, 509.
Frink v. Bellis, 166.
Pond, 201, 542.
Frissel v. Rozier, 32.
Frissel's Appeal, 276.
Fritz v. Pusey, 167.
Frinvel v. Zuber, 487.
Frost v. Beekman, 227, 289.
Deering, 151, 190, 245.
Methodist, etc. Soc., 59.
Raymond, 84.
Shaw, 466.
Spalding, 102.
Frith, *Re*, 542.
Frothingham v. March, 512.
Fry v. Platt, 4.
Sheehee, 282, 497.
Frye v. Bank of Illinois, 443.
Fryer v. Rockefeller, 249, 260.
Fuller v. Bennett, 282.
Carr, 87.
Eddy, 408.
Fuller, 29.
Hollis, 224.
Pratt, 417.
Sweet, 388.
Yates, 535.
Fulton v. Robinson, 4.
Fund Commissioners v. Glass, 261.
Funk v. Creswell, 166, 170, 171, 176.
Kincaid, 377.
Voneida, 166, 173.
Furbush v. Goodwin, 407, 411, 471, 483.
Furguson v. Miller, 415.
Furnas v. Durgin, 21, 170, 466.
Furrow v. Athey, 32.
Futrill v. Futrill, 29.

G.

Gadberry v. Sheppard, 125.
Gage v. Bates, 382.
Brewster, 479.
Gage, 205, 206, 211, 230.
Gaines v. Allen, 458, 537.
Gains v. Gains, 549.
Gaither v. Gibson, 212.
Galbreath v. Cook, 36.
Gale v. Coburn, 56, 76, 78.
Morris, 425.
Galland v. Jackman, 283.
Gallaghar v. Mass, 427.
Gallagher v. Bennett, 388.
Connell, 388.
Gallagher, 8.
Galpin v. Abbott, 252, 271.
Galt v. Dibrell, 271.
Jackson, 417.
Galway v. Malchow, 284.
Gamber v. Gamber, 33.
Gamble v. Johnson, 36, 37.
Games v. Stiles, 70.
Gammon v. Freeman, 182.
Hodges, 289.
Gannett v. Albree, 340.
Gannunt v. Gregg, 502.
Gano v. Vanderveer, 344.
Gans v. Aldridge, 100.
Ganson v. Madigan, 5.
Gardiner v. Corson, 160, 174.
Gardner v. Astor, 383.
Boothe, 37.
Emerson, 443.
Gardner, 245, 366.
Heyer, 575.
James, 485.
Keteltas, 344, 352.
Randall, 3.
Garfield v. Williams, 164.
Garland v. Watson, 514.
Garner v. Byard, 375.
Hannah, 336.
Heyer, 574.
Garnett v. Garnett, 67.
Stockton, 260, 265.

Garnhart v. Finney, 382.
Garnsey v. Rogers, 466.
Garrard v. Davis, 292.
Garrett v. Packett, 471.
Garrison v. Haydon, 271.
Sanford, 166.
Garroch v. Sherman, 470
Garth v. Fort, 260.
Gartrell v. Stafford, 6, 9.
Garvin v. Williams, 559.
Garwood v. Garwood, 287.
Gaston v. Weir, 15, 32, 68.
Gates v. Caldwell, 173.
Hester, 183.
Salmon, 31.
Gatewood v. House, 87.
Gault v. Hall, 55, 78.
McGrath, 443.
Gaus v. Thieme, 490.
Gay v. Hamilton, 414.
Ihm, 312.
Gazley v. Price, 167.
Gazzolo v. Chambers, 344.
Gear v. Barnum, 104.
Geary v. Kansas City, 290.
Gee v. Moore, 171.
Geiger v. Bolles, 235.
Gelston v. Shields, 571.
Gennessee River Bank v. Mead, 37.
Genter v. Morrison, 200.
George v. Arthur, 512.
Williamson, 36.
Wood, 278, 492.
German Amer. Bank v. White, 290.
German Association v. Scholler, 69.
Gerrish v. Black, 481.
Gerzebek v. Lord, 353.
Gest v. Flock, 254.
Getzler v. Saroni, 36.
Geyer v. Girard, 448.
Ghegan v. Young, 375.
Gibbert v. Peteler, 74, 277.
Gibbons v. Gentry, 256.
Hoag, 514.
Gibbs v. Chisholm, 449.
Penny, 416.
Swift, 249, 251.
Thayer, 39.
Gibson v. Barber, 514.
Bennett, 36.
Chouteau, 173.
Crehore, 383, 407, 478, 479, 480, 481.
Eller, 417.
Gibson, 174.
Jones, 460, 511.
McCormick, 492.
Norway Bank, 256.
Seymour, 444.
Shearer, 24.
Warden, 31.
Giddings v. Sears, 39.
Gifford v. Cornigan, 212.
Ford, 36.
First Presbyt. Society, 160.
Gilbert v. Anthony, 18, 21.
Bulkley, 165.
Holmes, 443.
Jess, 281, 282.
N. Y. Ins. Co., 224.
Gilbertson v. Richards, 331.
Giles v. Austin, 382.
Baremore, 486, 497.
Dugro, 167.
Warren, 549.
Gill v. Clarke, 425.
Fountleroy, 60, 274, 289.
Middleton, 344.
Pinney, 444.
Gillespie v. Bailey, 25, 27.
Brooks, 134.
Reed, 271.
Sawyer, 88.
Schuman, 571.
Gilliam v. Chancelor, 571.
Moore, 182.
Gillis v. Bailey, 232.
Gilloon v. Riley, 353.
Gilman v. Brown, 427.
Haven, 170.
Ill. & Miss. Tel. Co., 500.
Moody, 444.
Gilson v. Gilson, 425.
Gimell v. Adams, 236.
Girard v. Mayor, 534.
Givan v. Doe, 269, 470, 471.
Glass v. Ellison, 407.
Glasscock v. Glasscock, 180.
Smither, 549.
Glassock v. Glassock, 195.
Gleason v. Burke, 417.
Smith, 170.
Glenn v. Clanby, 347.
Thistle, 170.
Glidden v. Hunt, 472.
Glover v. Payne, 417.
Goddard v. Coe, 442.
Godeffroy v. Caldwell, 472.
Godfrey v. Watson, 480.
Godfroy v. Disbrow, 276.
Goff v. Denny, 471.
Gofford v. Stearns, 3.
Golcher v. Brisban, 512.
Goldsmith v. Osborne, 513.
Gomber v. Hackett, 340.
Good v. Coombs, 31.
Goode v. Comfort, 513.
Goodenough v. Warren, 219, 279, 282.
Goodhue v. Clark, 571.
Goodlett v. Hansell, 32, 193, 195, 200.
Goodman v. Cin. & Chicago R. R. Co., 445.
Wrieland, 37.
Goodnow v. Empire Lumber Co , 25.
Goodrich v. Milwaukee, 142.
Reynolds, 449.
Goodright v. Cator, 158.
Richardson, 323.
Goodspeed v. Fuller, 79.
Goodtitle v. Atway, 551.
Bailey, 73.
Pettoe, 152.
Goodwin v. Gilbert, 61.
Holbrook, 174.
Keney, 407.
Richardson, 401, 407, 490.
Goodwyn v. Baldwin, 486.
Gordon v. Bulkeley, 230.
George, 375.
Leach, 260.
Mulhare, 471, 490.
Sizer, 19.
Gore v. Brazier, 177.
Stevens, 389.
Gorham v. Daniels, 116, 136.
Gorin v. Gordin, 151.
Gosse v. Jones, 9.
Gould v. Bunster, 472.
Day, 211.
Eastern R. R. Co., 104.
Mansfield, 520.
Newman, 369, 471.
Steinburg, 36.
Gouverneur v. Lynch, 492.
Gower v. Howe, 471.
Winchester, 497.
Grady v. Robinson, 31.
Graeme v. Cullen, 458.
Graff v. Middleton, 59, 285.

Gragg v. Wagner, 167.
Graham v. Adams, 528.
Anderson, 237.
King, 513.
Long, 146.
Linden, 484.
Newman, 470, 471.
O'Fallon, 557.
Theis, 8.
Grand Gulf Banking Co. v. Bryan, 69.
Grandin v. Hernandez, 193.
Grannis v. Clark, 326.
Granniss v. Irwin, 251.
Grant v. White, 309.
Gratz v. Beates, 103.
Phillips, 414.
Graves v. Berdan, 357, 389.
Dudley, 206.
Graves, 252, 271.
Howard, 582.
Porter, 348.
Tucker, 224, 225.
Ward, 278.
Gray v. Clark, 98.
Convillon, 102.
Lake, 76.
Lynch, 153.
Ulrich, 249.
Graydon v. Graydon, 571.
Grayson v. Mayo, 491.
Grazebrook v. McCreedie, 314.
Greason v. Keteltas, 381.
Great Falls Co. v. Worster, 280.
Great Western Stock Co. v. Saas, 164, 165.
Green Bay, etc. Canal Co. v. Hewett, 59.
Green v. Abraham, 256.
Chelsea, 103.
Clark, 73.
Cross, 485, 511.
Drinker, 265.
Hague, 353.
Irving, 170.
James, 309.
Jones, 8.
Massie, 331.
Miller, 234.
Putnam, 181.
Thomas, 78.
Turner, 477.
Yarnall, 213.
Greene v. Tallman, 176.
Warnick, 470, 472.
Greenaway v. Adams, 361, 369.
Greenleaf v. Allen, 375.
Eads, 287.
Green's Appeal, 575.
Greenup v. Sewell, 48.
Greenwood v. Tyler, 113.
Greer v. N. Y. Cent. R. R. Co., 104.
Gregg v. Hamilton, 8.
Owens, 27.
Gregory v. Clark, 512.
Walker, 212.
Grellet v. Heilshorn, 473.
Grest v. Hodges, 170.
Greve v. Coffin, 236.
Grice v. Scarborough, 167.
Gridley v. Bingham, 36.
Watson, 37.
Grier v. Rhyne, 9.
Griesbaum v. Baum, 502.
Griffin v. Cranston, 442.
Cunningham, 9.
Fairbrother, 164.
Griffin, 426.
Knisely, 304.
Lovell, 483.
Marine Co. of Chicago, 513, 514.
Sheffield, 290.
Griffith v. Cox, 36.
Lovell, 467.
Schwenderman, 25, 33, 310.
Griggs v. Smith, 182.
Grimes v. Harmon, 571.
Kimball, 486.
Grimke v. Grimke, 534.
Grimman v. Legge, 387.
Grimsly v. Riley, 180, 195.
Griner v. Butler, 160.
Grist v. Hodges, 177.
Griswold v. Johnson, 31.
Smith, 280.
Groesbeck v. Seeley, 556.
Grofton v. Cummings, 6.
Gross v. Fowler, 380.
Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn, 452.
Grouer v. Smith, 195.
Grout v. Townsend, 79, 308.
Grover v. Flye, 483.
Fox, 502.
Thatcher, 473.
Grundin v. Carter, 313.
Guard v. Bradley, 208.
Guekian v. Riley, 473.
Guerrant v. Anderson, 279.
Guest v. Beeson, 29, 208.
Guild v. Richards, 124, 127.
Guinotte v. Chouteau, 175.
Guion v. Knapp, 492.
Pickett, 154.
Gunn v. Brantley, 477, 497.
Gunter v. Gunter, 542.
Williams, 31.
Guthrie v. Pugsley, 177.
Gutzweiler's Admr. v. Lackmann, 372.
Guy v. Sharpe, 5.
Guynn v. McCauley, 8.
Gwathney v. Cason, 4.
Gwinn v. Rooker, 31.

H.

Hackney v. Williams, 261.
Haddock v. Boston, etc. R. R., 55.
Haden v. Buddensick, 443.
Hadlock v. Hadlock, 206, 212.
Hager v. Buck, 362.
Hagerbuch v. Phillips, 27.
Brainard, 408, 411.
Hagerman v. Sutton, 471.
Hagerty v. Allaire Works, 443.
Haight v. Child, 8.
The City of Keokuk, 105.
Haines v. Spanogle, 8.
Thompson, 414, 416.
Hait v. Houle, 183.
Hale v. Christy, 27.
Joslin, 208, 213.
Rider, 500.
Russ, 21.
Wilkinson, 9.
Halford v. Hatch, 313.
Hall v. Ashby, 49, 59.
Bliss, 514, 515.
Brady, 170, 175, 550.
Callahan, 36.
Chaffee, 171.
Congdon, 146.
Cushman, 511.
Davis, 5, 88.
Dean, 167.
Dench, 550.
Eaton, 101.
Fullerton, 183.
Gittings, 260.
Hall, 502, 560.
Lance, 407.
Mayhew, 173.

Hall v. McDuff, 426.
Orvis, 73.
Savage, 181.
Stephens, 33.
Towne, 514.
Tunnel, 408, 411.
Hallenbeck v. Dewitt, 186.
Hallesy v. Jackson, 477.
Hallett v. Beebe, 105.
Hallett, 502.
Wylie, 304, 326.
Halley v. Troester, 26.
Halligan v. Wade, 357.
Hallocher v. Hallocher, 29, 78.
Halloway v. Lacy, 160.
Hallowell v. Hallowell, 541,
Halls v. Thompson, 260.
Halo v. Schick, 415.
Halton v. Kemp, 19.
Ham v. Goodrich, 8.
Hambright v. Brockman, 512.
Hamilton v. Blackwell, 79.
Cutts, 170.
Doolittle, 59.
Lubukee, 458, 459, 510, 512.
Nutt, 74, 277.
Pitcher, 67, 256.
Reed, 383.
Russell, 273.
Smith, 37.
Wilson, 164.
Wright, 84, 173.
Hamilton Hydrulic Co. v. C., H. & D. R. Co., 3.
Hamlet v. Johnson, 577.
Hamlin v. Paupoint Mf'g Co., 104.
Hammell v. Hammell, 212.
Hammerslough v. Cheatham, 208.
Hampton v. Stevens, 256.
Mourhead, 154.
H. & St. Jo. R. Co. v. Green, 97.
Hancock v. Amer. Life Ins. Co., 557.
Beverly, 286.
Harper, 416.
Watson, 98, 438.
Hand v. Hand, 260.
Hands v. Slaney, 310.
Handy v. Foley, 119.
Hanham v. Sherman, 386, 387.
Hankinson v. Borbour, 281.
Hanley v. Morse, 281.
Hanlone v. Doherty, 416, 473.
Hannah v. Carrington, 458.
Henderson, 170.
Swarner, 217.
Hannan v. Oxley, 79.
Hansen v. Buckner, 76.
Harbison v. Lemon, 414.
Hardy v. Akerly, 388.
Nelson, 177.
Hardeman v. Burge, 9.
Harden v. Darum, 32.
Hardin v. Hyde, 465.
Kirk, 257.
Osborne, 257.
Harding v. Handy, 26.
Hargrave v. King, 337.
Harkrader v. Leiby, 403, 407, 411.
Harlan v. Maglaughlin, 37.
Seatan, 286.
Harlow v. Cowdrey, 137.
Thomas, 167, 170, 175, 176.
Harmon v. Harmon, 36
Smith, 585.
Harmony Lodge v. White, 357, 375.
Harnickell v. Orndorff, 458.
Harpending v. Wylie, 263.
Harper's Appeal, 415, 480.
Harper v. Barsk, 252, 271.
Ely, 411, 445, 480, 496.
Harper v. Hampton, 246.
Perry, 79.
Phelps, 146.
Reno, 281, 284.
Tapley, 271.
Harriman v. Gray, 181.
Sutham, 34.
Harrington v. Christle, 451.
Gage, 204.
Fish, 261.
Fortner, 425.
Slade, 497.
Stees, 542.
Harrington v. Watson, 357.
Harris v. Carmsly, 28.
Carson, 297.
Cook, 493.
Coulbourne, 362.
Elliott, 93.
Hanks, 427
Hiscock, 387.
Hull, 101.
Jex, 465, 484.
Kelly, 362.
Mills, 497.
Mulock, 484.
Norton, 65, 204.
Pire, 540.
Rucker, 458.
Tyson, 28.
Vanderveer, 527, 559.
Harris' Estate, 576.
Harrison v. Elvin, 542.
Jackson, 31.
Oakman, 260.
Phillips' Academy, 204, 212, 414.
Simons, 68, 201, 261.
Tiermans, 21.
Town, 9.
Harriston v. Harriston, 549.
Harrod v. Myers, 25.
Harrold v. Simmonds, 274.
Harshaw v. McKesson, 445, 496.
Harsam v. Barrett, 416.
Harsh v. Griffin, 183.
Hart v. Farmers', etc. Bank, 281.
Hart, 551.
Rust, 221.
Windsor, 84, 344.
Withers, 314.
Hartford Fire Ins. Co. v. Wilcox, 242.
Hartley's Appeal, 241.
Hartley v. Frosh, 263.
Harrison, 74, 465, 466.
Tatham, 472, 483.
Hartman v. Kendall, 25.
Hartness v. Thompson, 25, 310.
Hartnett v. Wendell, 586.
Hartshorn v. Dawson, 260.
Day, 78.
Hartwell, v. Camman, 5.
Harty v. Ladd, 260.
Harvey v. Hobson, 26.
Hurlburt, 490.
McGrew, 376.
Harvey v. Armstrong, 554.
Chouteau, 554.
Harwell v. Harwell, 549.
Haseltine v. Donahue, 180.
Espy, 289.
Haskell v. Bailey, 477, 497.
Hastings v. Vaughn, 249, 251, 261.
Wiswall, 449.
Hatch v. Barr, 191.
Bates, 78, 208, 212.
Crawford, 31.
Hatch, 18, 208, 211.
Haskins, 275.
Hatfield v. Reynolds, 483.

Hathaway v. Payne, 225.
Hatzel v. Barber, 154.
Haughery v. Lee, 305.
Hauks v. Phillips, 190.
Haven v. Foster, 554.
Hilliard, 542.
Wakefield, 304.
Havens v. Osborne 18.
Van Den Burgh, 551.
Hawes v. Humphrey, 542, 550.
Hawesville v. Lander, 104.
Hawk v. McCullough, 84, 173.
Hakes v. Dodge County, etc. Ins. Co., 485.
Pike, 212.
Hawkins v. Burress, 260.
Chapman, 85.
Kemp, 151.
Hawkinson v. Herman, 3.
Hawley v. James, 535.
Northampton, 571.
Haworth v. Taylor, 274.
Hawtry v. Buthin, 438.
Hayden v. Wescott, 260.
Hayes v. Skidmore, 3.
Hayner v. Smith, 357, 389.
Haynes v. Haynes, 541, 542.
Seachrest, 31.
Haynes v. Stevens, 448.
Young, 101, 167, 170.
Haynie v. Robertson, 417.
Hays v. Hall, 425.
Peck, 79.
Haywood v. O'Brien, 377.
Shaw, 282.
Headley v. Goundry, 492.
Healdsling v. Bailboch, 205.
Healey v. Worth, 271.
Heard v. Baird, 458.
Heartley v. McAnulty, 36.
Heath v. Blake, 18.
Hall, 458, 496, 510, 515.
Nutter, 236.
West, 487.
Williams, 417.
Heaton v. Prather, 281, 289.
Hebert v. Doussan, 466.
Hebron v. Center Harbor, 413.
Hedge v. Drew, 208, 212.
Hedman v. Anderson, 36.
Hedrica v. Walker, 36.
Heeter v. Eekstein, 382.
Heffelfinger v. Shutz, 18.
Heffner v. Lewis, 362.
Hegeman v. McArthur, 387.
Heiern v. Mill, 74.
Heim v. Vogel, 466.
Heischfeldt v. George, 37.
Heise v. Heise, 549.
Heiss' Appeal, 527.
Heister v. Fortner, 252.
Helburn v. Mofford, 357.
Helfenstine v. Garrard, 136.
Hellans v. Abererombie, 39.
Helfin v. Wilton, 8.
Helman v. Cretban, 104.
Hemphill v. Ross, 407, 411.
Hendershott v. Ping, 497.
Henderson v. Ballimore, 65.
Barnwall, 7.
Ford, 242.
Henderson, 167, 575.
Hunton, 76
McGregor, 26.
Mayor, etc. of Baltimore, 204.
Palmer, 443.
Pilgrim, 470, 471.
Hendon v. White, 254.
Hendricks v. Rasson, 212.
Stark, 167.
Hendrix v. Boggs, 195.
Heney v. Heney, 211.
Henley v. Hotaling, 425.
Henning v. Fisher, 274.
Withers, 177.
Henrichsen v. Hodgen, 208.
Henry v. Bell, 435.
Colby, 3.
Etowah County, 124.
Flagg, 449.
Fullerton, 37.
Root, 310.
Tupper, 443.
Henry County v. Gates, 31.
Henshaw v. Mullens, 104.
Wells, 411.
Hepburn v. Auld, 9.
Herbert v. Berriet, 541.
Kenton, 183.
Herndon v. Kimball, 252, 271.
Herrick v. Hopkins, 95.
Malin, 19, 20.
Herring v. Woodhull, 471.
Herrington v. Budd, 550.
Herron v. Herron, 416.
Hershey v. Dennis, 488.
Herzog v. Sawyer, 31.
Hess v. Fox, 373.
Hesseltine v. Leavey, 387.
Hessing v. McCloskey, 36.
Hester v. Young, 520.
Hewitt v. Clark, 206, 281.
Templeton, 181.
Hewitt's Will, 542.
Hexter v. Knox, 353.
Heyder v. Excelsior Building Assoc., 493.
Heyer v. Pruyn, 497.
Heywood v. Hildreth, 210.
Wingate, 444.
Hibblewhite v. McMorine, 21, 245.
Hickman v. Perrin, 281.
Hickox v. Lowe, 443.
Hicks v. Bingham, 492.
Hicks v. Downing, 369.
Hidden v. Jordan, 480.
Higbee v. Rice, 270.
Higgins v. Senior, 7.
Turner, 388.
Higinbotham v. Stoddard, 101.
Hiles v. Coult, 467.
Hiles v. LaFlesh, 260.
Hill v. Bacon, 167, 256, 257.
Barclay, 354.
Bowers, 576.
Eldred, 426.
Felton, 571.
McNichol, 204, 206, 212.
Meeker, 286.
Mowry, 88.
Murray, 279.
Paul, 287.
Robertson, 408.
Samuel, 249.
West, 491.
Hillegas v. Hartley, 279.
Hillhouse v. Dunning, 417.
Hilliard v. Phillips, 4.
Hills v. Barnes, 18.
Loomis, 416.
Hillyer v. Bennett, 25.
Hilmert v. Christian, 171.
Hinchliff v. Hinman, 206, 251.
Hinchman v. Emans, 473.
Hind v. Poole, 458.
Hinde v. Longworth, 37.
Hinds v. Ballow, 182, 470.
Hine v. Robbins, 289.
Hinman v. Booth, 227.

Hinsdale v. Humphrey, 61.
Hinson v. Partee, 415.
Hitchcock v. Harrington, 407.
Hitchcock, 571.
Merrick, 443, 451, 470.
Hoag v. Owen, 206.
Rathbun, 476.
Hobbs v. Wetherwax, 8.
Hobson v. Kissam, 260.
Roles, 471.
Hodgdon v. Shannon, 443.
Hodgen v. Guttery, 478.
Hodges v. Thayer, 175.
Hodgson v. Ambrose, 574.
Hoes v. Boyer, 36.
Hoff v. Tobey, 104.
Hoffman v. Anthony, 511, 512.
Coster, 264.
Harrington, 515.
Mackall, 100, 424.
Ryan, 415, 416.
Stiger, 32, 33.
Carnth, 256.
Hogan v. Hogan, 27.
Page, 67.
Small, 550.
Hoge v. Hollister, 181, 183.
Hogg v. Odom, 67.
Hoig v. Adrian College, 226.
Hoit v. Hoit, 550.
Russell, 513.
Holbrook v. Chamberlin, 365.
Finney, 182.
Tirrell, 386.
Holden v. Burnham, 37.
Gilbert, 445.
Stickney, 508.
Holford v. Dunnett, 345.
Hatch, 372.
Hollenbeck v. Shoyer, 493.
VanValkenburgh, 542.
Holliday v. Arthur, 415.
Cromwell, 271.
Marshall, 373.
Hollingshead v. Sturgis, 547.
Hollis v. Burgess, 4.
Holloway v. Galloway, 541.
Holman v. Bank of Norfolk, 492.
Creagmiles, 167.
Holmes v. Albee, 4.
Blagg, 25.
Braidwood, 36.
Clark, 37.
Grant, 417.
Holmes, 3.
McGinty, 471.
Stout, 280.
Turner Fall Co., 104.
Holyoke v. Haskins, 600.
Home Ins. Co. v. Davis, 33.
Sherman, 389.
Homer v. Homer, 146.
Homestead Ass'n v. Enslow, 183.
Honore v. Hutchings, 417.
Hoodless v. Reid, 513.
Hood v. Brown, 204.
Powell, 183.
Hood v. Mowre, 281.
Hooker v. Pynchon, 9.
Hooper v. Bailey, 417.
Smith, 312.
Wilson, 408.
Hoover v. Kinsey Plow Co., 25.
Hope v. Harman, 213.
Sawyer, 256.
Hopkins v. Delaney, 260.
Grimes, 582.
Lee, 177.
Mollinieux, 233.
Organ, 371.
Roberts, 9.
Stephenson, 417.
Hopkirk v. Randolph, 37.
Hopson v. Commonwealth, 575.
Horbach v. Hill, 36, 414, 417.
Horman v. Deming, 444.
Horn v. Keteltas, 416.
Ludington, 8.
Hornbeck v. Westbrook, 69, 118, 119, 331.
Hornby v. Cramer, 512.
Horner v. Zimmerman, 36.
Horrigan v. Wellmuth, 451.
Horsefall v. Mather, 345.
Horsey v. Hough, 513.
Horsley v. Garth, 271, 274, 275, 289.
Horstman v. Gerker, 472.
Horton v. N. Y. Cent. R. R. Co., 388.
Sledge, 55, 60, 136.
Horwitz v. Davis, 370.
Norris, 154.
Hosmer v. Sargent, 513.
Hosper v. Almstedt, 473.
Hostetter v. Alexander, 472.
Hotchkiss v. Barnes, 5.
Houble v. Volkening, 484.
Hough v. Doyle, 445.
House v. Burr, 354.
Tennessee College, 449.
Houston v. Carl, 33.
Sneed, 102.
Spruance, 126.
Stanton, 213, 427.
Hout v. Hout, 249.
Houx v. Batteen, 102, 190.
Hovey v. Blanchard, 282.
Chase, 26.
Hill, 472.
Hobson, 26, 311.
How v. Vigures, 401.
Howard v. American, etc., Society, 571, 574.
Ames, 514.
Brower, 3.
Ellis, 300.
Gresham, 472, 491.
Harris, 478.
Hatch, 512.
Hildreth, 486, 497.
Patrick, 207, 211.
Robinson, 411.
Williams, 37.
Howards v. Davis, 514.
Howe v. Howe, 25, 29, 38, 213.
Russell, 415.
Woodruff, 487.
Howell v. Edmonds, 36.
Merrill, 107.
Richards, 164, 344.
Tyler, 516.
Howland v. Coffin, 348.
Leach, 174.
Hoy v. Allen, 287.
Bramhall, 492.
Hoyt v. Hoyt, 471.
Hunt, 8.
Kimball, 126.
Parks, 33.
Swar, 27.
Thompson's Executors, 469.
Hubbard v. Allen, 79.
Apthrop, 171.
Jarrell, 513.
Jasinski, 569.
Norton, 167, 175.
Turner, 479.
Hubbell v. Sibley, 477, 512.
Hubly v. Harris, 417.
Huckins v. Straw, 407.
Hudson v. Irwin, 108.
Poindexter, 189, 195.

Huebsch v. Scheel, 79, 473.
Huey v. Huey, 205.
Huff v. Huff, 542.
Hug v. McCauley, 45.
Price, 27.
Hughes v. Debnam, 194.
Edwards, 124, 477, 497.
Lane, 260.
Vanstone, 353.
Watson, 25.
Watt, 388.
Hulick v. Scovil, 34, 209, 211, 214.
Hull v. Alexander, 464.
King, 512.
Sturdivant, 9.
Hulse's Will, *Re*, 542.
Humphrey v. Hurd, 409.
Wait, 353.
Humphreys v. Merrill, 287.
Hundley v. Mount, 272.
Hunn v. Case, 542.
Hunt v. Adams, 18, 21.
Amidon, 318, 358.
Danforth, 376.
Dohrs, 502, 503.
Gardner, 375.
Hamilton, 557.
Hort, 574.
Hunt, 59.
Johnson, 32, 73, 260.
Mootrie, 542.
Hunter v. Giddings, 245.
Mills, 8.
Morse, 106.
Osterhoudt, 340.
Waite, 37.
Watson, 34, 67, 280.
Huntington v. Lyman, 111.
Hurd v. Coleman, 443, 485.
Curtis, 118, 347.
Robinson, 444.
Hurlbert v. Wheeler, 222.
Hurley v. Estes, 409, 497.
Taylor, 36.
Hurt v. Kelly, 511.
Huse v. McQuade, 5.
Huss v. Morris, 87.
Stephens, 34, 70.
Hussey v. Castle, 33.
Hutchins v. Carelton, 473.
Dixon, 88.
Gilman, 232.
Heywood, 136.
Moody, 167.
Hutchinson v. Bramhall, 272.
Dearing, 407.
Hartman, 284.
Hutchinson, 76.
Rust, 251, 263.
Huth v. Carondelet, 25.
Hutton v. Benkard, 155.
Hutzler v. Phillip, 426.
Huxley v. Harrold, 260.
Herald, 257.
Huyler v. Atwood, 466.
Hyland v. Stafford, 509.
Hyman v. Devereux, 423, 458, 471.
Hymes v. Esty, 170.
Hyndman v. Hyndman, 574.

I.

Ide v. Stanton, 4.
Iglehart v. Crane, 492.
Ikerd v. Beaver, 9.
Illinois Central R. Co. v. McCullogh, 226.
Illinois Fire Ins. Co. v. Stanton, 452.
Illinois R. Co. v. Indiana R. Co., 119.
Inches v. Leonard, 497.
Indianapolis Mfg. Union v. C. C. C. & I. R. R. Co., 369.
Ing v. Brown, 50.
Cromwell, 445.
Ingersoll v. Sergeant, 23.
Ingle v. Culbertson, 458, 511, 512.
Ingles v. Patterson, 8.
Ingoldsby v. Juan, 261.
Ingraham v. Baldwin, 26, 311.
Disborough, 472.
Grigg, 260.
Ingram v. Little, 21.
Ingersen v. Rankin, 353.
Inhabitants South Boswick v. Huntress, 21.
In re Bellesheim, 27.
Chawner's Will, 423.
Covey's Will, 541.
Dyer, 540.
Frith, 542.
Heberton, 536.
Hulse's Will, 542.
Phillips, 261.
Sheridan, 542.
Shillabee, 540.
Tuller, 551.
Ireland v. Abbott, 502.
Nichols, 340, 380.
Irvin v. Smith, 273.
Irvine v. Irvine, 25.
McKeon, 79.
Irving v. Brownell, 257, 261.
Irwin v. Dyne, 8.
Irwin, 542.
Longworth, 113.
Zane, 571.
Isham v. Bennington Co., 252, 271.
Ives v. Davenport, 154.
Ives, 10.
Kimball, 260.
Van Auken, 118.
Ivey v. Granberry, 78.
Ivory v. Burnes, 146.

J.

Jack v. Schoenberger, 553.
Jacks v. Turner, 508.
Jackson v. Alexander, 78, 83.
Allen, 249, 340, 382.
Andrew, 382.
Andrews, 24.
Bard, 204, 210.
Betts, 549.
Blodgett, 10, 471.
Bodle, 211.
Bowen, 443.
Bradford, 309.
Bronson, 471.
Brownson, 382.
Caldwell, 55, 56, 78.
Campbell, 197.
Catlin, 227.
Clark, 10, 71, 513.
Cleveland, 208, 212.
Corey, 69.
Corliss, 337, 361.
Crafts, 483.
Cutright, 8.
Davenport, 156.
Davis, 483.
Delacroix, 304.
Delancey, 78, 116, 377, 580.
Dillon, 56, 78.
Dominick, 443.
Dunlap, 211.
Dunsbagh, 56.
Elston, 279.
Florence, 76, 78.
Freer, 102.

Jackson v. Gardner,387.
Garnsey, 36, 37.
Gilchrist, 182.
Gould, 20.
Gunmaer, 26, 260.
Harper, 377.
Harris, 512.
Harrison, 336.
Hayner, 187.
Henry, 36.
Holloway, 312, 535, 549.
Hoover, 571.
Hubble, 59.
Hudson, 486.
Ireland, 114.
Ketchum, 24.
Kipp, 336.
Kisselbrack, 10, 304.
Laughnead, 349.
Leek, 56. 207.
Litch, 3.
Lowe, 4.
Mancius, 388.
Marsh, 170.
McCall, 210.
McClallen, 333.
Miner, 37.
Minkler, 472.
Monterief, 10.
Murray, 9, 309.
Myers, 10.
Neely, 74, 278.
Page, 279.
Peek, 37.
Perrine, 88.
Phillips, 202.
Phipps, 207, 209, 214.
Post, 287.
Potter, 534.
Pratt, 486.
Rice, 271.
Richards, 212.
Root, 71.
Rowland, 226, 227, 349, 388.
Sackett, 497.
Scoonmaker, 263.
Schutz, 382.
Sebring, 55.
Sheldon, 204, 224.
Shepard, 251.
Shoonmaker, 65.
Siebring, 78.
Silvernail, 361.
Stanford, 31.
Stevens, 169, 309.
Stockhouse, 491.
Swart, 116.
Titus, 373.
Todd, 310.
Topping, 98, 339.
Town, 37.
Veder, 151.
Walsh, 288.
Willard, 370, 471.
Winslow, 169, 171, 364.
Wood, 269.
Zwart, 55, 56, 116.
Jacobs v. Davis, 176.
Miller, 33.
Jacoway v. Gault, 260.
Jacques v. Short, 74, 277, 348.
Jaffe v. Harteau, 344.
James v. Drake, 281.
Morey, 383, 470, 472, 473.
Roberts, 443.
Jamison v. Craven, 205.
Dimock, 8.
Jamison, 559.
James v. Jenkins, 167.
Jaques v. Gould, 330.
Weeks, 261, 281.
Jarnagan v. Gaines, 485.
Jarrett v. McDaniel, 438, 443.
Jarvis v. Albro, 497, 504.
Dutcher, 426.
Jayne v. Gregg, 65, 204.
Jeffery v. Graham, 124.
Jeffries v. Jeffries, 9,
Jelks v. Barrett, 4.
Jenckes v. Cook, 388.
Jencks v. Alexander, 512.
Jenison v. Hapgood, 514.
Jenkins, Will of, 541.
Jenkins v. Einstein, 36.
Jenkins v. Eldridge, 304.
Hopkins, 167, 176.
Hurt, 180, 195.
Jenkins, 25.
Jones, 460.
Pye, 29.
Stetson, 496.
Ward, 167.
Jenkinson v. Fahey, 9.
Jenness v. Robinson, 479.
Jennings v Alexander,349.
Brizeadine, 83, 88.
Jennings, 571.
Wood, 289.
Jenny v. Jenny, 182.
Jenny Lind Co. v. Bower, 5.
Jerome v. Ortwan, 193.
Jesse v. Parker, 542.
Jewell v. Porter, 32, 36.
Jewett v. Cook, 36.
Ricker, 119.
Stockton, 31.
John v. Hatfield, 18.
Johns v. Whitley, 338, 382.
Johson's Will, 557.
Johnson v. Anderson, 443.
Badger, etc. Co. 260.
Baker, 222.
Beazley, 73.
Brailsford, 549.
Branch, 225.
Brown, 471.
Bryan, 260.
Candage, 479.
Carnett, 471.
Carpenter, 470, 472.
Collins, 176.
Delaney, 146.
Dodge, 7.
Dorsey, 512.
Douglas, 382.
Farley, 205, 208, 211, 212.
Fay, 183.
Gurley, 382.
Harmon, 479.
Hart, 471.
Hollensworth, 160.
Houston, 401, 408.
Huston, 411.
Johnson, 492, 542.
Leonard, 470.
McGehee, 254.
Monell, 464.
Moore, 18.
Muzzy, 61.
Nations, 486.
Oppenheim. 389.
Pfifer, 26,30.
Phœnix Mut. Life Ins. Co., 304, 364.
Reed, 174.
Rice, 492.
Richardson, 443.
Rogers, 32.
Sherman, 376, 483.

Johnson v. Skaggs, 36.
Stagg, 210.
Stillings, 32.
Taylor, 79, 265.
Turner, 458.
Walton, 260.
Watson, 407, 514.
White, 481.
Wilkinson, 3.
Wright, 236.
Zink, 465, 466.
Johnson County v. Wood, 99.
Johnston v. Eason, 513.
Glancy, 8.
Haines, 258.
Jones, 4.
Jolland v. Strainbridge, 281.
Jones v. Berkshire, 265.
Berryhill, 449.
Bowler, 506.
Brewington, 425.
Bush, 212.
Butler, 25.
Cincinnati Type Foundry, 34.
Conde, 500.
Crawford, 193.
Dougherty, 78.
Elliott, 444.
Franklin, 168, 169.
Gardner, 167.
Hartley, 550, 553.
Hughes, 26.
Janes, 427.
Jones, 9, 361, 541.
King, 37.
Larabee, 542.
Mack, 515.
Moore, 513.
Morris, 193.
Mudd, 9.
Patterson, 312.
Powers, 271.
Reed, 336.
Robinson, 571.
Schulmeyer, 443, 445.
Shewmaker, 554.
Smith, 74, 472.
Warner, 170.
Williams, 571.
Woods, 155.
Jordan v. Cheney, 471.
Corey, 260, 264.
Davis, 206.
Eve, 167.
Godman, 183.
Jordan, 168.
McClure, 85, 114.
Mitchell, 449.
Peak, 183.
Pollack, 224.
Sayre, 492.
Stevens, 56.
Joslyn v. Wyman, 443.
Joy v. Adams, 497.
Joyner v. Farmer, 514.
Judd v. Fulton, 380.
O'Brien, 512.
Woodruff, 69.
Judge v. Forsythe, 503.
Judy v. Williams, 574.
Justice v. Lang, 6.

K.

Kabley v. Worcester Gas Co., 304.
Kain v. Old, 5.
Kaine v. Weigley, 36.
Kamena v. Huelbig, 472.
Kamphouse v. Goffner, 327.
Kane v. Roberts, 37.
Kansas Pacific R. R. Co. v. Dunmeyer, 170.
Kansas City Sav. Ass'n v. Martin, 503.
Karmuller v. Krotz, 91.
Karnes v. Lloyd, 411.
Keams v. Keams, 557.
Keating v. Condon, 372.
Keen v. Monroe, 18.
Keenan v. Cavanaugh, 101.
Keichline v. Keichline, 251.
Keith v. Swan, 315.
Kellam v. Kellam, 125.
Keller v. Moore, 255.
Orr, 27.
Kelleran v. Brown, 414, 415.
Kelley v. Pike, 31.
Sheldon, 9.
Vigas, 576.
Kellogg v. Ames, 473, 485.
Carrico, 512.
Dickerson, 486.
Frazier, 444.
Hale, 137.
Ingersoll, 167.
Kellogg, 33.
Loomis, 249.
Malin, 165, 167, 176.
Mix, 571.
Mullen, 101.
Platt, 170.
Richardson, 36.
Robinson, 167, 348.
Smith, 103, 470.
Kelly v. Bryan, 416.
Calhoun, 253, 260.
Dunlap, 254.
Kelly, 585.
Mills, 287.
Reynolds, 571.
Rosenstock, 259.
Thompson, 414.
Kellum, *In re*, 559.
Kelsey v. Remer, 167.
Tourtelotte, 365, 367.
Kembal v. Scrafton, 551.
Kemerer v. Bournes, 496.
Kemp v. Porter, 256.
Walker, 208.
Kendall v. Kendall, 554.
Lawrence, 25, 310.
Kennedy v. Knight, 449.
Northup, 286.
Ross, 445.
Stacy, 183.
Kennelly v. Kelly, 485.
Kenner v. Amer. Con. Co., 124.
Kennett v. Plummer, 407, 408.
Kenney v. Norton, 170.
Kent v. Agard, 183.
Lasley, 416.
Waite, 93.
Welch, 173.
Kentucky River Co. v. Commonwealth, 382.
Kenyen v. Segar, 206.
Kepner v. Keefer, 39.
Kerns v. Swope, 252, 281.
Kerr v. Birnie, 78, 212.
Day, 145.
Freeman, 49, 59.
Gilmore, 414, 416.
Hill, 3.
Merchant's Exchange, 389.
Merrill, 344.
Moon, 532.
Russell, 268.
Kerwin, *Ex parte*, 21.
Kessler v. McConachy, 357.
State, 274, 289.

Ketchum v. Johnson, 417.
Keteltas v. Coleman, 359.
Keteltas, 571.
Keyes v. Bump, 436.
Wood, 471.
Kickland v. Menasha, etc. Co., 79.
Kiersted v. Orange, etc. R. R. Co., 366.
Kieser v. Baldwin, 485.
Kiester v. Miller, 386.
Kilborn v. Robbins, 470.
Kilgour v. Gockley, 471.
Kille v. Ege, 212.
Killmore v. Howlett, 3.
Kilpatrick v. Henson, 451.
Kilpatrick, 287.
Kimball v. Blaisdell, 171.
Cuddy, 26.
Eaton, 187
Johnson, 256.
Lackwood, 370.
Pike, 370.
Semple, 90, 171, 260.
Thompson, 36.
Kime v. Brooks, 230, 245.
Kimpton v. Bronson, 484.
Walker, 173, 346.
Kincaid v. Brittain, 164, 165.
King v. Beck, 575.
Duntz, 511.
Gilson, 164, 165, 173, 175.
Harrington, 470.
Housatonic R. R. Co., 377.
Jones, 349.
Lougnor, 245.
Meighen, 477.
Newman, 417.
Robinson, 512.
Ruckman, 5.
State Mutual Fire Ins. Co., 452.
Stetson, 182.
Whiteley, 466.
King's Chapel v. Pelham, 339.
King's Heirs v. Thompson, 8.
Kingdon v. Nottle, 164.
Kingsbury v. Burnside, 146, 241.
Milner, 177.
Kingsland v. Chittenden, 104.
Kingsley v. Holbrook, 200.
Kinley v. Hill. 483.
Kinnear v. Lowell, 167.
Kinnebrew v. Kinnebrew, 79.
Kinney v. Watts, 84.
Kinsley v. Ames, 423.
Kip v. Merwin, 353, 357.
Kirk v. Dean, 182.
Kirkaldie v. Larrabee, 448.
Kirksey v. Snedecor, 37.
Kiser v. Heuston, 289.
Kissam v. Dierkes, 154.
Gaylord, 101.
Kitchen v. Kitchens, 557.
Lee, 310.
St. John, 364.
Van Dyck, 182.
Klaer v. Ridgway, 118.
Klein v. McNamara, 416.
Klinck v. Price, 415, 416.
Kline v. Beebe, 25.
Jacobs, 344, 353.
Kline, 37.
Vogel, 513.
Klock v. Cronkhite, 512.
Klopworth v. Dressler, 465.
Knadler v. Sharp, 164, 166.
Knapp v. Maltby, 21.
Marlbore, 352.
Pattison, 541.
Smith, 312.
Kneeland v. Van Valkenburg, 104.
Knepper v. Curtz, 170, 173.
Knickerbocker v. Killmore, 574
Knife v. Palmer, 311.
Knight v. Clement, 10.
New England Co., 5.
Thayer, 27, 169.
Knoff v. Hansen, 225.
Knolls v. Barnhart, 212.
Knowles v. Carpenter, 464, 466, 473.
Hull, 381.
Kennedy, 169.
Lawton, 475
Knowlton v. Walker, 414, 477.
Knox v. Bailey, 376.
Galligan, 472.
Johnson, 485.
Koch v. Briggs, 458, 477.
Konconrek v. Mawak, 28.
Koehler v. Black River, etc. Co., 197.
Koger v. Weakley, 502.
Kohn v. Clement, 36.
Kornegay v. Collier, 370, 377.
Spicer, 509, 514.
Kortright v. Cady, 443, 451, 480, 483.
Commercial Bank of Buffalo, 21.
Kortz v. Carpenter, 170.
Kramer v. Carter, 176.
Farmers', etc. Bank, 496.
Weinert, 526.
Krider v. Ramsey, 375.
Kronenberger v. Hoffner, 101.
Krueger v. Ferrant, 344.
Kruse v. Wilson, 96.
Kuhns v. Bankes, 353, 471.
Kurtz v. Hollinghead, 65.
Sponable, 471.
Kutter v. Smith, 354
Kutz v. McCune, 167.
Kuykendald v McDonald, 36.
Kyle v. Kavanagh, 59.

L.

Labaree v. Carleton, 77, 126.
Laberge v. Chauvin, 471.
Lacey v. Marnan, 175.
Lacke v. Coleman, 364.
Rowell, 5.
Laclede Bank v. Keeler, 563.
Lacey v. Wilson, 288.
Ladd v. Ladd, 153, 154.
Smith, 387.
Wiggin, 491.
Ladd's Will, 549.
Ladnier v. Ladnier, 36.
La Farge Fire Ins. Co. v. Bell, 282.
Laidley v. Knight, 260.
Laird v. Scott, 37, 249, 260.
Lake v. Campbell. 364.
Gray, 76, 78, 249.
Lally v. Holland, 289.
Lamar v. Turner. 74
Lamarque v. Laughlair, 260.
Lamb v. Burbank, 172.
Danforth, 167, 170.
Gittman, 541.
Helm, 586.
Tucker, 466.
Wakefield. 31, 171.
Lambert v. Kinney, 183.
Smith, 78.
Lamberton v. Merchants' Nat. Bank, 287.
Lamount v. Stimson, 281.
Lampton v. Usher, 214.
Lampson v. Clarkson, 388.
Lamy v. Burr, 236.
Lanahan v. Ward, 449.
Lancashire v. Mason, 372.
Lancasshire v. Lancasshire, 154

Lance's Appeal, 416.
Lancey v. Phœnix Fire Ins. Co., 5.
Landers v. Beck, 416.
Bolton, 251, 263, 280.
Brant, 280.
Landrum v. Union Bank, 513.
Lane v. Fury, 177.
Kingsbury, 37.
Lane, 542.
Thompson, 91.
Vick, 571.
Lanfair v. Lanfair, 442.
Langdon v. Keith, 471.
Langridge v. Payne, 445.
Langton v. Marshall, 260.
Lansing v. Goelet, 502.
Van Alstyne, 357.
Lapham v. Olney, 532.
Large v. Van Doren, 485.
Larison v. Burt, 8.
Larson v. Reynolds, 183.
Lasey v. Simpson, 278.
Lassen v. Vance, 182.
Latham v. Latham, 571.
Udell, 205.
Lathrop v. White, 33.
Latimer v. Moore, 315.
Laughlin v. McDevitt, 526.
Laughton v. Atkins, 547, 549.
Hardin, 37.
Lavender v. Adams, 540.
Lawless v. Collier, 175.
Lawrence v. Brown, 377, 385.
Farmer's Loan & Trust Co., 459, 511, 513.
Fox, 466.
Gebhard, 236.
Knapp, 471.
Stratton, 470.
Taylor, 230.
Towl, 464.
Lawton v. Buckinham, 79, 175.
Gordon, 36, 201.
Sager, 224.
Lawyer v. Slingerland, 183.
Layman's Will, 559.
Layman v. Whiting, 515.
Layton v. Hastings, 31.
Leach v. Duvall, 37.
Koenig, 388.
Learned v. Chouteau, 9.
Cutler, 181, 182.
Foster, 512.
Leary v. Durham, 168.
Leavitt v. Fletcher, 344, 353, 357.
Lamprey, 181.
Towle, 118.
Lebanon School Dist. v. Lebanon Female Sem., 383.
LeBean v. Glaze, 491.
Lee v. Adkins, 180, 195.
Alexander, 18.
Birmingham, 291.
Cato, 288.
Cherry, 4, 5.
Kingsbury, 183.
Mahoney, 4.
Mason, 511.
Newman, 74.
Tucker, 114.
Leeds v. Cameron, 443.
Compton, 361.
Lees v. Brownings, 559.
Lefevre v. Lefevre, 535, 574.
Murdock, 27.
Leffel v. Schermerhorn, 36.
Leffingwell v. Elliott, 177.
Leffler v. Armstrong, 512.
LeFranc v. Richmond, 193.
Legare v. Ashe, 548.
Leiby v. Wolf, 276.
Leitensdorfer v. Delphy, 85.
Leland v. Collver, 452.
Leman v. Whitley, 146.
Lenox v. Reed, 424.
Lente v. Clark, 4.
Leonard v. Burgess, 370.
Leonard, 26.
Morris, 508.
Villars, 449.
Vredenburg, 4.
White, 582.
Leppie v. Union Bank, 212.
Lerned v. Morrill, 102.
Leshey v. Gardner, 36.
Leslie v. Craig, 536.
Lestrade v. Barth, 281.
Lettick v. Honnold, 389.
Levey v. Dyess, 345.
Levow v. Wilmuth, 37.
Levy v. Merrill, 4
Lewis v. Baird, 252, 271.
Beall, 57.
Chisholm, 344.
Coxe, 182.
Hinman, 289.
Lewis, 101.
Overby, 180, 195.
Paschal, 449.
Payne, 18, 20, 367.
Richey, 496.
Starke, 471.
Wells, 458.
Libbey v. Talford, 344.
Liber v. Parsons, 177.
Lickmon v. Harding, 263.
Liddell v. Sims, 174.
Life Association v. Cook, 409.
Lightner v. Mooney, 273.
Lillard v. Rucker, 69, 279.
Lilley v. Fifty Associates, 382.
Lillie v. Dunbar, 3.
Lilly v. Palmer, 466, 473.
Linch v. Livingston, 83.
Linden v. Hepburn, 369.
Lindley v. Dakin, 165, 377.
Groff, 224, 227.
Lindsay v. Lindsay, 222.
Line v. Blizzard, 28.
Lines v. Darden, 571.
Lingke v. Wilkinson, 37.
Linker v. Long, 20.
Linn v. Burgoyne, 232.
Patton, 260.
Lippett v. Kelly, 108.
Lippencott v. Mitchell, 33.
Lippold v. Held, 485.
Litterall v. Jackson, 9.
Little v. Hazard, 31.
Herndon, 19.
Weatherford, 260.
Littleton v. Addington, 586.
Littlewort v. Davis, 415.
Livingston v. Livingston, 550.
Mayor, 173.
Peru Iron Co., 24.
Potts, 387.
Prosens, 24.
Lloyd v. Bunce, 37, 88.
Scott, 449.
Williams, 449.
Lloyd's Lessees v. Taylor, 182.
Loader v. Kemp, 353.
Lockett v. Hall, 458.
Hill, 514.
Lockhart v. Beckley, 37.
Roberts, 21.
Lockwood v. Lockwood, 477, 557.
Sturtevant, 165.

Lodge v. Leverton, 5.
Turman, 417.
Loeb v. McCullogh, 32.
Logan v. Anderson, 386.
Bull, 9.
Moulder, 177.
Simmons, 37.
Williams, 265.
Long v. Dollarhide, 278.
Long, 180, 195.
Miller, 4.
Moler, 167.
Wade, 407.
Wagoner, 90.
White, 3.
Longfellow v. Longfellow, 388.
Longwith v. Butler, 423.
Loomis v. Bedel, 170, 171.
Bush, 32, 271.
Donovan, 496.
Pingree. 65, 204.
Looney v. McLean, 344, 353.
Lord v. Bourne, 535.
Falmar, 200, 249.
Lord, 542.
Morris, 497.
Sherman, 236.
Loring v. Cooke, 484.
Losee v. Morey, 9.
Los Angeles Assoc. v. Phillips, 9.
Losey v. Bond, 27.
Simpson, 472.
Lothrop v. Foster, 181.
Lonbat v. Kipp, 225.
Loud v. Darling, 24.
Loughridge v. Bowland, 271, 287.
Love v. Buchanan, 575.
Howard, 558.
Johnston, 553.
Shields, 50, 259.
Sierra Nevada, etc. Mining Co., 246.
Wells, 39.
Love's Executors v. Welch, 6.
Lovejoy v. Lovett, 108.
Richardson, 190.
Lovelace v. Webb, 443.
Lovelace's Case, 245.
Lovering v. Lovering, 84, 173.
Lovett v. Dimond, 472.
Steam Saw Mill Association, 197.
Low v. Graff, 415, 416.
Purdy, 511.
Lowe v. Griffiths, 310.
Weatherley, 79.
Lowell v. Daniels, 27.
Strahan, 361.
Wren, 263.
Lowery v. Drew, 31.
Lucas v. Claflin, 36.
Coulter, 344.
Harris, 471.
Lucas, 37.
Luce v. Dimock, 534, 554.
Luck's Appeal, 426.
Luckett v. Williamson, 2.
Ludeke v. Sutherland, 4.
Ludington v. Harris, 465, 466.
Ludlow v. Kidd, 24.
Ludlow, 542.
New York & Hudson R. R., 382.
O'Neil, 254.
Van Ness, 271.
Lufkin v. Curtis, 181.
Lumbard v. Aldrich, 33.
Lumpkin v. Wilson, 237.
Lund v. Lund, 395.
Rice, 271.
Luney v. Mead, 466.
Lunn v. Gage, 353.
Lunsford v. LaMotte Lead Co., 186.
Lunt v. Lunt, 170.
Lydston v. Powell, 423.
Lyerly v. Wheeler, 65.
Lyford v. Ross, 469, 470.
Lyles v. Lyles, 529.
Lyman v. Babcock, 5.
Loomis, 87.
Lynch v. Baldwin, 389.
Livingston, 56, 256.
Onondago Salt Co., 173.
Lynde v. Budd, 25.
Hough, 337, 340, 361.
Lyon v. Green Bay R. R. Co., 33.
Kain, 67.
Kent, 233.
McIlvaine, 473.
Reed, 387.
Robbins, 479.
Smith, 542.
Lyons v. Van Riper, 186.

M.

Machias Hotel Co. v. Fisher, 390.
Mack v. Patchin, 177, 344.
Wetzlar, 171.
Mackall v. Richards, 85.
Mackay v. Bloodgood, 196.
Mackey, *Re*, 512.
Mackreth v. Symmons, 427.
Madden v. Tucker, 4.
Madison City v. Hildreth, 108.
Maeder v. Carondelet, 173, 343.
Magee v. McMann, 9.
Magill v. Mer. Trust Co., 33.
Magness v Arnold, 259.
Magnusson v. Johnson, 416.
Magruder v. State Bank, 443.
Maguire v. Riggan, 165, 170.
Mahoney v. Middleton, 288.
Main v. Feathers, 357.
Ryder, 541.
Maine Bank v. Butts, 449.
Majors v. Rice, 102.
Major's Admr. v. Buckley, 111.
Malcolm v. Allen, 445.
Malin v. Malin, 18, 145.
Malins v. Brown, 8.
Mallett v. Page, 493.
Mallory v. Horan, 181.
Hitchcock, 473.
Stodder, 273, 274, 288.
West Shore Hudson River R. R. Co., 496.
Monandas v. Mann, 252.
Mandeville v. Parker, 542.
Mandlebaum v. McDonell, 585.
Manegold v. Barlow, 291.
Maney v. Porter, 163.
Manhattan Co. v. Osgood, 449.
Manning v. Brown, 171.
Smith, 112.
Mansony v. U. S. Bank, 407.
Mantle v. Wallington, 314.
Manuf. Bank v. Bank of Penn., 429.
Mapps v. Sharpe, 471.
Mara v. Pierce, 280.
Marbury v. Thornton, 170.
March v. Huyter, 31.
Marchant v. Errington, 73.
Marden v. Chase, 56, 83, 116.
Margraf v. Muir, 9.
Marine Bank v. International Bank, 496.
Mariner v. Saunders, 249.
Markland v. Crump, 348.
Markol v. Andras, 427.
Marks v. Crow, 37.

Marlborough v. Godolphin, 152.
Marple v. Scott, 167.
Marquat v. Marquat, 312.
Marqueze v. Caldwell, 6.
Marr v. Given, 235.
Marr, 549.
Marsh v. Austin, 208, 209.
Martindale, 449.
Mitchell, 101.
Pike, 465.
Turner, 427.
Marshall v. Billingsley, 472.
Bompart, 106.
Croom, 36.
Fisk, 136.
Roberts, 285.
Trumbull, 118.
Marston v. Brashaw, 261.
Brittenham, 263.
Hobbs, 165.
Marston, 37.
Roe, 551.
Martel v. Somers, 281.
Martin v. Baker, 164, 166, 348, 349, 376.
Ballou, 125.
Colburn, 27.
Flowers, 246.
Fridley, 479.
Long, 175.
Martin, 32.
Mitchell, 527.
Mowlin, 409.
McReynolds, 471.
Noble, 502.
O'Connor, 369.
Osborne, 582.
Paxson, 511.
Stearns, 387.
Waddell, 105.
Weyman, 6.
Williams, 273.
Martindale v. Smith, 483.
Martineau v. McCollum, 471.
Marvin v. Titsworth, 458.
Vedder, 485.
Maryland, etc. Co. v. Wingert, 485.
Marys v. Anderson, 389.
Masle v. Kuhlman, 74.
Mason v. Ainsworth, 458, 510.
Barnard, 445, 464, 466.
Brock, 201, 249,
Cooksey, 170, 177.
Mason, 4.
Smith, 376.
Northwestern Ins. Co., 476.
White, 87.
Massey v. Westcott, 287.
Massie v. Greenhow, 281.
Masterson v. Creek, 208.
Mastin v. Haley, 249, 264.
Masury v. Southworth, 347, 350, 359.
Mather v. Corliss, 211, 227.
Heather, 37.
Scoles, 9.
Mathews v. Aiken, 465.
Coalter, 19.
Demeritt, 279.
Jarret, 9.
Jordan, 37.
Wallwyn, 472.
Ward, 270.
Matson v. Melchen, 37.
Matter v. Rovcr, 571.
Matthie v. Edwards, 509, 511.
Matthews v. Heyward, 472.
Ward's Lessee, 45.
Matthiessen & W. R. Co. v. McMahon, 242.
Mattice v. Lord, 382.
Mattix v. Weand, 485.
Mau v. Pierson, 165.
Maul v. Rider, 276, 281.
Maule v. Ashmead, 84, 173.
Maupin v. Emmons, 279, 283, 284.
Maus v. McKellip, 443.
Worthing, 230.
Maxon v. Scott, 312.
May v. Borel, 282.
Le Claire, 59, 285.
Maybury v. Brien, 182, 407.
Mayer v. Adrian, 8.
Gowland, 550.
Isaac, 99.
Mayham v. Coombs, 427.
Mayhew v. Hardesty, 373.
Maynard v. Maynard, 212.
Mercer, 236.
Vinton, 542.
Mayor of New York v. Mayble, 84, 170 344, 352.
Mayor, etc. v. Williams, 546.
Mays v. Price, 32.
McAfee v. McAfee, 492.
McAfferty v. Conover, 88.
McAlister v. Gilmore, 580.
McAnnally v. O'Neil, 37.
McAnulty v. McAnulty, 551.
McBryde v. Wilkinson, 249.
McBurney v. McIntyre, 361, 370.
McCabe v. Farnsworth, 470.
Grey, 274, 289.
Swap, 465.
McCamant v. Patterson, 279.
McCan v. Marshall, 415.
McCann v. Atherton, 224.
McCandless v. Engle, 472.
McCanley v. Grimes, 182.
Fulton, 70.
McCarron v. Cassidy, 480.
McCartney v. Osburn, 575.
McCarty v. Leggett, 164.
Pruet, 427.
McClain v. Sullivan, 473.
McClellan v. McClellan, 146.
McClintock v. Laing, 9.
McClung v. Steen, 18, 21.
McClure v. Burnes, 471.
Colclough, 205.
Gamble, 177.
Harris, 182.
McClure, 549.
McClurg v. Phillips, 290, 425, 503.
McCole v. Loehr, 37.
McCollough v. Cox, 126.
McComb v. Wright, 366.
Spangler, 33.
McConnel v. Reed, 59.
McConnell v. Bryner, 3.
Brillhart, 4.
Brown, 65, 204.
McCormack v. Sage, 4.
Woods, 249.
McCormick v. Bush, 153, 232.
Digby, 471, 491.
Fitzmorris, 19.
Hernden, 416.
Liggett, 25.
Malin, 9.
Stowell, 361.
McCoy v. Hance, 102.
Rhodes, 287.
McCracken v. Hayward, 501.
McCraney v. Alden, 449.
McCraven v. McGuire, 256.
McCrea v. Purmort, 6, 79.
McCrelish v. Churchman, 174.
McCreary v. Skinner, 36.
McCullouch v. Endaly, 286.
McCurdy v. Alpha Mining Co., 112.
Weall, 554.

McDaniel v. Johns, 118.
McCoy, 26.
McDonald v. Crandall, 181.
Eggleston, 21.
Morgan, 70.
Morton, 26.
McDonough v. Laughlin, 542.
McDougald v. Capron, 478.
McDowell v. Fisher, 443.
Simpson, 7.
McDuff v. Beauchamp, 33.
McElfresh v. Guard, 542.
McEwen v. Troost, 205.
McFadden v. Worthington, 284, 287.
McFarlan v. Watson, 313.
McFarland v. Febiger, 182.
McGary v. Hastings, 170, 177.
McGee v. McGee, 182.
Porter, 541.
McGill v. Ware, 449.
Woodward, 76.
McGinnis v. Kempsey, 559.
McGiven v. Wheelock, 473.
McGlashan v. Tallmadge, 344.
McGlynn v. Moore, 336, 340, 382.
McGonigal v. Plummer, 427.
McGowan v. Branch Bank of Mobile, 502.
Hitt, 37.
McGrady v. Brisbane, 166.
McGrath v. Berry, 183.
Boston, 304.
McGraw v. McGraw, 212.
McGready v. McGready, 443.
McGregor v. Comstock, 58.
McGuffie v. Carter, 388.
McGuire v. Kerr, 541.
Van Pelt, 458, 485.
McIntier v. Shaw, 414.
McKaskie v. Amarine, 280.
McKay v. Carrington, 145.
McKean v. Mitchell, 252.
McKee v. Bain, 175.
Hicks, 220.
McKenzie v. Lexington, 386.
McKey v. Welch, 31.
McKildoe v. Darracott, 340.
McKim v. Mason, 453.
McKinley v. Lamb, 542, 559.
McGregor, 233.
McKinney v. Harvey, 4.
Reader, 386.
Settles, 82.
McKinnon v. Reliance Lumber Co., 36.
McKinzie's Appeal, 585.
McKissick v. Colquhoun, 271.
McLane v. Johnson, 36, 37.
McLaughlin v. Bishop, 327.
Cosgrove, 443.
Shepherd, 414.
McLean v. Lafayette Bank, 36, 492, 493.
Nelson, 209.
Presley, 445, 514.
Ragsdale, 496.
Wilson, 196.
McLarew v. Benton, 295.
McMahon v. Bowe, 24.
McGraw, 249.
Morrison, 76.
McManus v. Carmichael, 105.
McMasters v. The Commonwealth, 265.
McMechan v. Griffing, 281, 283.
McMenty v. Frank, 230.
McMullen v. Eagan, 260.
McMullin v. Solomon, 357.
McMurphy v. Minot, 370.
McMutrie v. Bennett, 8.
McMutry v. Brown, 190, 245.
McNair v. Lot, 477.
Picott, 491.
McNamara v. Culver, 417.
Seaton, 102.
McNamee v. Withers, 8.
McNaughton v. Partridge, 31, 240.
McNeely v. Rucker, 263.
McNeil v. Ames, 372.
McNeill v. Norsworthy, 417.
McNitt v. Turner, 287.
McPherson v. Featherstone, 208.
Sanborn, 263.
Wiswell, 8.
McQuestion v. Morgan, 335, 336.
McQuie v. Peay, 425.
McRaven v. Crisler, 174.
McGuire, 195.
McSorley v. Larissa, 470.
McTaggart v. Thompson, 550.
McVey v. Green Bay R. R. Co., 33.
McWharter v. McMahon, 7.
McWhorter v. Wright, 76.
McWilliams v. Lawless, 7.
Meacham v. Steele, 467.
Mead v. Combs, 29.
Jennings, 570.
York, 443.
Meador v. Meador, 426.
Meagher v. Thompson, 190.
Means v. Presbyterian Church, 88.
Moore, 549.
Mechanics' Sav. Bank v. Goff, 466.
Mecum v. Peoria, etc. R. R. Co., 174.
Medley v. Elliot, 451, 497.
Medsker v. Swaney, 514.
Meech v. Ensign, 466.
Fowler, 65, 204.
Meekan v. Rourke, 542.
Meeker v. Meeker, 79.
Meeting House v. Hilton, 326.
Mellen v. Ames, 36.
Whipple, 331, 466.
Mellican v. Mellican, 146.
Melviu v. Fellows, 444.
Props, etc., 216.
Memphis R. R. Co. v. Neighbors, 124.
Menard v. Crowe, 512.
Mendenhall v. Parish, 79.
Meni v. Rathbone, 273, 336, 382.
Menkens v. Blumenthal, 102.
Mense v. McLean, 281.
Merchant's Will, 541.
Merchants' Bank v. Spicer, 70.
Meredith v. Jones, 137.
Merrick v. Wallace, 289.
Merrifield v. Parritt, 245.
Merrill v. Bullock, 33.
Chase, 483.
Emory, 124.
Montgomery, 253.
Merrills v. Swift, 208, 212, 214.
Merriman v. Moore, 466.
Merrin v. Lewis, 458.
Merritt v. Bartholick, 409, 470, 471.
Clason, 16.
Hosmer, 479.
Morse, 170.
Mervin v. Murphy, 438.
Metcalf v. Brandon, 212.
Methodist Church v. Jaques, 205.
Met. Life Ins. Co. v. Meeker, 28.
Meurer's Will, 542.
Meyer v. Fogg, 542.
Kinzer, 33.
Lathrop, 466.
Meysenburg v. Schlieper, 509.
Miama, etc. Co. v. United States Bank, 415.
Michael v. Foil, 3.
Michigan Insurance Co. v. Brown, 444, 472, 497.
Middlebury College v. Cheney, 169.

Middlesex Bank v. Minot, 514.
Middleton v. Findla, 67, 70, 190.
Pritchard, 105.
Selby, 9.
Miles v. Boyden, 554.
Gray, 471.
King, 287.
Lingerman, 25.
Mill Dam Foundry v. Hoover, 197.
Millay v. Wiley, 542.
Miller v. Adkinson, 571.
Aldrich, 452.
Bradford, 289.
Chittenden, 34.
Craig, 26.
Edgerton, 79.
Fletcher, 224.
Goodwin, 79.
Harbert, 365.
Heine, 312.
Henshaw, 261.
Hull, 512, 513.
Irvine, 4.
Kirby, 36.
Mann, 87.
McNeil, 541.
Miller, 37, 559.
Morris, 362.
Physick, 297, 211.
Thompson, 37, 466.
Thornton, 344.
Yturria, 416.
Millican v. Millican, 29.
Milliken v. Bailey, 180.
Mills v. Baehr's Ex., 357.
Catlin, 99, 165, 171.
Comstock, 470.
Darling, 414.
Dennis, 502.
Hamilton, 388.
Smith, 279, 281.
Van Voorhis, 182.
Watson, 466.
Milton v. Wann, 104.
Mims v. Lockett, 8.
Minard v. Mead, 246.
Miner v. Beekman, 409, 480.
Clark, 170.
Miner's Ditch Co. v. Zellerback, 191, 197, 253.
Minor v. Hill, 496.
Minot v. Curtis, 574.
Minturn v. Seymour, 78.
Mitchell v. Bartlett, 204.
Bogan, 423.
Burnham, 395, 469, 470.
Colglorzier, 33.
Cook, 470.
Maupin, 238.
Parham, 180, 195.
Pillsbury, 167.
Ryan, 207, 209.
Warner, 164, 167.
Wilson, 111.
Mix v. Hotchkiss, 443.
Madison Insurance Co., 441.
Mixell v. Lutz, 37.
Mizner v. Russell, 443.
Moale v. Cutting, 541, 542.
Mobray v. Leckie, 415.
Model Lodging House Association v. City of Boston, 512.
Modisett v. Johnson, 9.
Moffatt v. Hardin, 472.
Smith, 353, 357.
Mohr v. Parmalee, 167.
Mole v. Thomas, 549.
Moline Wagon Co. v. Rummesell, 31, 36.
Monroe v. Arledge, 260.
Hamilton, 271.
Monroe v. Poorman, 263.
Montag v. Linn, 19, 255.
Montague v. Allen, 540.
Boston & Albany R. R. Co., 480.
Dawes, 512, 514.
Montayne v. Wallahan, 389.
Montcalm v. Smith, 502.
Montgomery v. Chadwick, 414, 477.
Dorian, 230.
McEwen, 509.
Milliken, 532.
Reed, 165, 170.
Spect, 416.
Sturdivant, 60, 111.
Moody v. McCown, 10.
Palmer, 104.
Moores v. White, 554.
Mooney v. Cooledge, 119.
Moore v. Aberthnay, 25.
Beason, 478.
Bond, 485.
Cable, 480.
Cord, 470.
Dimond, 577.
Farrow, 230.
Fuller, 443.
Giles, 212.
Gordon, 8.
Griffin, 91.
Hazelton, 213.
Hegeman, 571.
Hunter, 271.
Ivers, 18.
Jordan, 280.
Lanham, 168.
Leseur, 195.
Lowery, 36.
Merrill, 162.
Metropolitan National Bank, 472.
New York, 181.
Pendleton, 230.
Ragland, 443.
Rake, 27.
Sloan, 470.
Sotter, 20.
Tisdale, 182.
Vall, 170.
Wade, 416.
Weber, 344.
Moran v. Dillehay, 571.
Moreau v. Detchemendy, 58.
Moreland v. Barnhart, 416.
Morey v. Sohier, 534.
Morgan v. Burgen, 7.
H. & St. Joe R. R. Co., 170.
Morgan, 287, 477.
Smith, 387.
Moritz v. Lavelle, 3.
Mormon v. Mormon, 26.
Morrill v. Killner, 37.
Noyes, 438.
Phillips, 575.
Morris v. Bacon, 471.
Geisecke, 183.
Harris, 27, 173.
Henderson, 580.
Jones, 31.
Nixon, 30.
Sargent, 182.
Stephens, 67.
Swaney, 557.
Tillson, 353, 389.
Tuthill, 496.
Vanderen, 19.
Ward, 183.
White, 490
Morris Canal v. Ryerson, 79.

Morrison v. Bean, 588.
Brand, 417.
Brown, 271.
Caldwell, 65.
Dailey, 4.
Galloway, 174.
Kelly, 208
McArthur, 175.
Mendenhall, 470.
Morrison, 26, 186.
Peay, 9.
Rossignal, 354.
Shattuck, 288.
Underwood, 164, 176.
White, 257.
Morrow v. Higgins, 230.
Morse v. Carpenter, 69.
Clayton, 260.
Dewey, 438.
Merritt, 504.
Morse, 551.
Rogers, 101.
Wright, 279.
Morton v. Barrett, 575.
Dean, 7.
Ingram, 542.
Leland, 200.
Stone, 7.
Mosby v. Hodge, 458.
Moseley v. Hodge, 508.
Mosely v. Marshall, 296.
Moses v. McClain, 183.
Mosher v. Chapin, 443.
Moshier v. Knox College, 36.
Meek, 427.
Moss v. Anderson, 193.
Gallimore, 315, 407.
Motley v. Sargent, 104.
Mott v. Clark, 471, 472.
Harrington, 415.
Mott, 104.
Palmer, 164, 165.
Smith, 237.
Moule v. Weaver, 61.
Moulton v. Trafton, 118.
Mounce v. Byars, 426.
Mounsey v. Blamire, 575.
Mount v. Kesterson, 249, 260.
Mowatt v. Carow, 575.
Mowrey v. Walsh, 36.
Moyer's Appeal, 8.
Muir v. Cross, 427.
Galloway, 260.
Muldrow v. Fox, 153.
Robison, 281.
Mulford v. Peterson, 471, 473.
Mullanphy v. Simpson, 479.
Muller v. Boggs, 256.
Boone, 253, 260.
Mullison's Estate, 443.
Mullin v. Bloomer, 8.
Mullins v. Cabiness, 174.
Mulliken v. Graham, 281.
Mulvey v. Gibbons, 515.
Gibson, 514.
Mundy v. Vawter, 281, 458.
Mumford v. Brown, 353.
Mummy v. Johnson, 271.
Munigle v. Boston, 381.
Munn v. Burges, 513, 514.
Fabian, 8.
Worrall, 118.
Munter v. Linn, 413.
Murdock v. Memphis, etc. R. R. Co., 260.
Murphy v. Calley, 414, 417.
Campbell, 93.
Murphy, 542.
Murray v. Ballow, 24, 163.
Blackledge, 70, 470.
Murray v. Emmons, 312.
Harway, 340, 361, 362.
Judson, 74.
Shave, 385.
Stair, 225
Murrell v. Jones, 469.
Musgat v. Pumpelly, 5.
Musgrave v. Sherwood, 167.
Musgrove v. Bonser, 252, 279, 291.
Kennell, 472.
Muskingeene Turnpike v. Ward, 69.
Musser v. Johnson, 197.
Mussey v. Holt, 20, 370, 377.
Mustard v. Wohlford, 25.
Mutter's Estate, 571.
Mutual Benefit Life Ins. Co. v. Brown, 7.
Mutual Life Ins. Co. v. Sandfelter, 37.
Myers v. Boyd, 259, 260.
Brownell, 473.
Buchanan, 289.
Burns, 348.
Eddy, 571.
Estell, 400, 508.
Myers, 576.
Reed, 33.
Myrover v. French, 214.

N.

Nary v. Merrill, 39.
Natchez v. Minor, 69.
Nathan v. Arkright, 25.
National Bank v. Conway, 256.
Eldridge, 153.
Natoma Mining Co. v. Clarkin, 33.
Nagro v. Ware, 436.
Nave v. Berry, 313, 345, 362, 370.
Neale v. Neale, 8.
Neave v. Jenkins, 10.
Neelson v. Sanborn, 4.
Neesom v. Clarkson, 480.
Neff's Appeal, 548.
Neligh v. Michenor, 413.
Nellis v. Lathrop, 388.
Nelson v. Everett, 443.
Ferris, 471.
Hall, 103.
Lee, 486.
McGiffert, 548.
Pub. Admr., 549.
State, 103.
Thompson, 387.
Neppoch v. Jordan, 304.
Nesbitt v. Cavender, 416.
Neufville v. Stewart, 4.
Nevada Bank v. Bryan, 28.
Nevins v. Gourley, 571.
Nevitt v. Bacon, 497.
Nevlin v. Osborn, 65.
New v. Potts, 153.
Newbold v. Comfort, 370.
Newby v. Rogers, 6.
Newell v. Mayberry, 20.
Newell, 36
Sanford, 329.
Newhall v. Burt, 414.
Savings Bank, 478.
N. E. Jewelry Co. v. Merriam, 473.
New Hampshire Co. v. Noyes, 25.
New Hampshire Land Co. v. Tilton, 249.
New Haven Sav. Bank v. McParttan, 485.
N. J. Zinc Co. v. Boston Franklinite Co., 588.
New York Chem. Mfg. Co. v. Peck, 472
New York Fire Ins Co. v. Ely, 449.
New York Life Ins. Co. v. Howard, 491.
Smith, 470.

New Orleans Banking Assoc. v. Adams, 429.
New Orleans Canal Co. v. Montgomery, 438.
Newlin v. Beard, 213.
Newman v. Chapman, 407.
De Larimer, 497.
Fanguhar, 183.
Kershaw, 465.
Locke, 478.
Samuels, 264, 265, 424.
Willetts, 558.
Williams, 449.
Newton v. Bealer, 205.
McKay, 67.
Niagara Bank v. Rosevelt, 472, 485.
Nical v. Carr, 9.
Nicholas v. Kershner, 526.
Nichols v. Baxter, 452.
Fearson, 449.
Johnson, 4, 18.
Lee, 472.
Luce, 93.
Nichol, 9.
Reynolds, 274, 289, 415.
Stewart, 261.
Suncook Mfg. Co., 104.
Toney, 415.
Walter, 175
Nicholson v. Caress, 8-5, 114.
Nickerson v. Saunders, 4.
Nightingale v. Hidden, 33, 136.
Withington, 25.
Niles v. Commissioners, 449.
Nimmons v. Westfall, 571.
Nixon v. Cobleigh, 70.
Hyserott, 235.
Noble v. Enos, 524.
Googins, 173.
Noble, 36.
Noell v. Graves, 445.
Nolen v. Gwyn, 284.
Norcross v. Norcross, 411.
Noreum v. Droench, 154.
Nordyne Co. v. Gery, 452.
Norman v. Burnett, 146.
Wells, 347, 348, 349, 376, 377.
Norris v. Harris, 532.
Hill, 104.
McCanna, 36.
Wait, 25.
Northampton Bank v. Balliet, 470.
Northtop v. Boone, 8.
Northup v. Brehmer, 273.
Northwestern Mut. Life Ins. Co. v. Nelson, 28.
Norton v. Babcock, 177.
Jackson, 170.
Webb, 453.
Norvell v. Walker, 180, 196.
Norwich v. Hubbard, 401.
Norwich Fire Ins. Co. v. Boomer, 452.
Noyes v. Clark, 445.
Johnson, 9.
Nunemacher v. Ingle, 485.
Nunnely v. Doherty, 31.
Nunnery v. Cotton, 18.
Nute v. Nute, 281.
Nutt v. Norton, 551.
Nutting v. Dickinson, 4.
Herbert, 75, 280.
Nye v. Lowry, 15.

O.

Oakey v. Cook, 9.
Oatman v. Fowler, 271, 278.
Oats v. Walls, 274, 289.
Obermeyer v. Nichols, 174.
O'Brien v. Gaslin, 25.
Wetherell, 122.
Young, 181.
O'Connell v. Bryant, 104.
O'Conner v. Reimpt, 26, 30.
Shipman, 451.
O'Daniel v. Crawford, 37.
Odell v. Buck, 26.
Montross, 415, 476.
Odenbaugh v. Bradford, 416.
O'Donald v. Constant, 36.
O'Ferrell v. Simplot, 260, 264.
Ogden v. Walters, 260, 501.
Ogle v. Ship, 479.
Ohio Life Insurance Co. v. Ledyard, 287.
Ohio Life Insurance and Trust Co. v. Reeder, 496.
O'Keefe v. Kennedy, 170, 382.
O'Kelly v. O'Kelly, 225.
Old Colony R. Co. v. Evans, 6.
Olds v. Cummings, 472, 510.
Oliver v. Houdlet, 25.
Platt, 285
Stone, 204, 212.
Olmstead v. Niles, 364.
Olmsted v. Elder, 70.
O'Meara v. North American, etc. Co., 70, 190.
O'Neal v. Farr, 554.
O'Neil v. Capelle, 415, 416.
O'Neil's Seixas, 471.
O'Neil's Will, 542.
O'Neill v. Chandler, 36.
Ord v. McKee, 471
Ormsby v. Barr, 486.
Tarascon, 511.
Orndorff v. Hummer, 542.
Orr v. Hadley, 102, 407.
Orrick v. Boehm, 571.
Osborn v. Cook, 542.
Phelps, 9.
Osborne v. Moss, 37.
Osgood v. Abbott, 124, 127.
Breed, 600.
Franklin, 153.
Thorne, 36.
Osterhout v. Shoemaker, 26, 220.
O'Sullivan v. Overton, 4.
Oswald v. Fratenburgh, 357, 375.
Gilfert, 358.
Otis v. Spence, 37.
Smith, 582.
Ottawa Northern Plank Road Co. v. Murray, 445.
Ottenhouse v Burlson, 8.
Otto v. Doby, 207.
Oulds v. Sansom, 231.
Onsby v. Jones, 98.
Overman v. Kerr, 218.
Owen v. Ellis, 155, 585.
Norris, 260.
Perry, 21.
Switzer, 155.
Owens v. Lewis, 3.
Oxley v. Lane, 571.

P.

Pack v. Gaither, 9.
Packard v. Ames, 126.
Richardson 4.
Padfield v. Padfield, 550.
Page v. Esty, 354.
Page, 182.
Palmer, 126.
Pierce, 471.
Robinson, 450.
Waring, 278, 280.
Paige v. O'Neil, 36.
Sherman, 79.

Paine v. Benton, 444.
French, 471.
Wilcox, 8.
Pallexfen v. Moore, 145.
Palmer v. Butler, 497.
Call, 449.
Edwards, 313.
Mead, 502.
Miller, 25.
Richardson, 8.
Pancake v. Cauffman, 416.
Pardee v. Lindley, 458, 471.
Paris v. Hulett, 502.
Parish v. Murphree, 37.
Whitney, 167.
Park v. Bates, 177.
Mears, 202.
Pratt, 24.
arker v. Baxter, 451.
Brown, 165.
Cane, 281.
Cole, 534.
Dacres, 476.
Hill, 212.
Kane, 20.
Nichols, 56.
Parker, 582, 600.
Smith, 173.
Parkhurst v. Cummings, 491.
Van Cortland, 4, 5,
Parkman v. Welch, 37, 492.
Parks v. Hall, 415.
Willard, 281.
Parmelee v. Simpson, 212, 288.
Parmenter v. McDaniel, 21.
Walker, 514.
Webber, 337.
Parmer v. Parmer, 480.
Parret v. Shanblant, 271.
Parrott v. Barney, 362.
Parshall v. Shirts, 20.
Parsons v. Boyd, 275.
Noggle, 477.
Welles, 469, 470, 485.
Winslow, 535.
Partridge v. Hatch, 165.
Partridge, 470.
Smith, 281.
Pasey v. Bullitt, 31.
Past v. Kearney, 348, 369.
Patapsco Guano Co. v. Morrison, 154.
Patmor v. Haggard, 4.
Paton v. Rogers, 9.
Patrick v. Sherwood, 296.
Patridge v. Hatch, 175.
Patten v. Casey, 37.
Deshow, 346, 349, 377.
Moore, 280.
Pearson, 514.
Thornton, 33.
Patterson v. Arthurs, 167.
Carneal, 83.
Cunningham, 9.
Donner, 443.
English, 540.
Johnson, 443.
Mills, 473.
Snell, 59, 205, 212, 213.
Yeaton, 2.
Pattison's Appeal, 3.
Pattison v. Horn, 415.
Patton v. Deshon, 376.
Wagner, 48.
Patty v. Pease, 492.
Paul v. Fulton, 284.
Paxon v. Lefferts, 168.
Paxton v. Harrier, 492.
Payne v. Avery, 427.
Bettisworth, 174.
Howell, 500.
Payne v. Patterson, 414.
Pavey, 289.
Payne, 554.
Safe, 115.
Wilson, 425.
Peabody v. Fenton, 373.
Hewett, 68.
Peabody Heights Co. v. Sadtler, 104.
Pearce v. Hall, 444.
Morris, 478.
Savage, 485, 491.
Wilson, 415.
Pearsall v. Kingsland, 472.
Pearson v. Seay, 417.
Pease v. Allis, 542.
Kelly, 427.
Lawson, 194.
Pilot Knob Iron Co., 155, 408, 515.
Pecare v. Chouteau, 164.
Peck's Appeal, 485.
Peck v. Denniston, 104.
Hensley, 170.
Jones, 170.
Mallams, 88, 252.
Mallows, 96.
Mayo, 449.
Vandenburg, 79.
Vandemark, 4.
Ward, 27.
Williams, 8.
Peckham v. Barker, 8.
Balch, 8.
Pecock v. Tompkins, 260.
Peebles v. Horton, 29.
Reading, 281.
Peed v. McKee, 443.
Peek v. Peek, 8, 76.
Peeples v. Stolla, 425.
Peisch v. Dickson, 5.
Pell v. Ball, 580.
Pemberton v. Pollard, 33.
Pence v. Arbuckle, 21.
Pendill v. Neuberger, 324.
Pendleton v. Button, 260.
Dyett, 357.
Pomeroy, 182.
Pendred v. Griffith, 354.
Pennington v. Hanby, 417.
Penniman v. Cole, 39.
Hartshorn, 6.
Pennock v. Lyons, 340.
Pennsylvania Co. v. Dovey, 205.
Salt Co v. Neel, 32, 79.
Penny v. Cormithe, 18.
Penrose v. Griffith, 73.
Pensoneau v. Pulliam, 477.
Pentz v. Stanton, 246.
People v. Bostwick, 226.
Gillis, 304.
Henderson, 104.
Keyser, 490.
Organ, 18.
Plumstead, 183.
Robertson, 369, 380.
People of Vermont v. Society, 127.
People's Bank v. Mitchell, 382.
Pepin County v. Prindle, 124.
Pepper v. Carter, 37.
Peques v. Mosby, 174.
Perdue v. Aldridge, 249.
Montgomery, 33.
Perjue v. Perjue, 549.
Perkins v. Dibble, 401, 483.
Hadsell, 6.
Pitts, 485, 491.
Sterne, 171.
Strong, 291.
Webster, 173.
Perminter v. McDaniel, 18.

Perre v. Castro, 483.
Perrin v. Lepper, 377.
Reed, 271.
Perrine v. Cheeseman, 189, 195.
Perry v. Grant, 427.
Price, 43, 56, 77, 78, 197.
Peter v. Beverly, 153.
Peters v. Jamestown Bridge Co., 471, 472.
Siers, 571.
Spillman, 534.
Peterson v. Clark, 414, 429, 450.
Leik, 25.
Petition of Young, 119.
Pettee v. Case, 496.
Hawes, 118.
Pettengill v. Evans, 497.
Mather, 491
Pettibone v. Griswold, 444.
Pettit v. Fritz, 33.
Pettman v. Sofley, 281.
Petty v. Dill, 485.
Grisard, 27.
Petty, 37.
Peugh v. Davis, 416, 476.
Peyton v. Ayres, 496.
Pfoff v. Golden, 370, 375.
Pfiffner v. S. & St. P. R. R. Co., 8.
Phelan v. Olney, 471.
Phelliplace v. Sayles, 36.
Phenix Bank v. Stafford, 37.
Phelps v. Sage, 483.
Stillings, 4.
Pheonix v. Gardner, 415.
Philadelphia & E. R. R. v. Catawissa R. R., 361.
Philbrook v. Adams, 4.
Delano, 427.
Phillimore v. Barry, 6.
Philips v. Bank of Lewiston, 470, 472.
Phillips, *Re*, 261, 542.
Phillips v. Bank of Lewiston, 471.
Coffee, 253.
Croft, 416.
Green, 25.
Houston, 211.
Hulsizer, 415.
North, 37.
Pitts, 280.
Reichert, 177.
Ruble, 259.
Sinclair, 477.
Thompson, 8.
Tudor, 31.
Wooster, 37
Phipps v. Tarpley, 175, 177.
Piatt v. Oliver, 168.
Pickens v. Davis, 549.
Pickering v. Langdon, 548.
Pickett v. Doe, 260.
Jones, 458, 470, 471, 510.
Pickett, 170.
Pickney v. Burrage, 260.
Hagadorn, 7.
Picks v. Reed, 249.
Pierce v. Brew, 79, 167.
Brown, 254, 385.
Corf, 7.
Faunce, 288, 472.
Hakes, 190.
Hall, 210.
Indeeth, 194.
Johnson, 165.
Knecland, 443, 455.
Milwaukee, etc., 438.
Minturn, 327.
Nichols, 9.
Robinson, 416.
Rowe, 449.
Traver, 416.
Turner, 278.
Pierson v. Armstrong, 44, 83, 193.
David, 427.
Hooker, 490.
Piggot v. Mason, 354.
Pike v. Bacon, 31.
Brown, 466.
Collins, 444.
Monroe, 184.
Pilling v. Armitage, 354.
Pillow v. Roberts, 194.
Pilmer v. Bank, 5.
Pinchain v. Collard, 427.
Pindall v. Bank of Marietta, 449.
Pinneo v. Goodspeed, 480.
Pioneer Gold Min. Co. v. Baker, 417
Piper v. True, 5.
Pippin v. Ellison, 580.
Pitcher v. Barrows, 444.
Pittingill v. Devin, 59, 285.
Pitts v. Cable, 417.
Parlser, 427.
Pixley v. Bennett, 181.
Plato v. Roe, 414.
Platt v. Brown, 59.
McClure, 509.
Playter v. Cunningham, 352.
Plimpton v. Ins. Co , 452.
Plumb v. Tubbs, 122.
Plymouth v. Carver, 162, 167.
Polack v. Pioche, 362.
Poland v. O'Conner, 8.
Polden v. Bastard, 93.
Polk v. Cosgrove, 282, 289.
Faris, 115.
Reynolds, 473.
Pollard v. Cocke, 287.
Hagan, 105.
Kibbe, 105.
Lively, 271.
Shaeffer, 348.
Pollock v. Glassell, 541, 542.
Pollock v. Morris, 104.
Pomeroy v. Ainsworth, 449.
Bailey, 37.
Pomroy v. Stevens, 280, 283.
Ponce v. McWhorter, 8.
Pond v. Bergh, 533.
Ponton v. Ballard, 280.
Poole v. Buffum, 541.
Poole v. Bentley, 304.
Gerard 183.
Pooley v. Webb, 33.
Poor v. Robinson, 533.
Pope v. Burrage, 512.
Durant, 445, 451.
Henry, 271.
Jacobus, 471.
O'Hara, 93.
Poplin v. Hawke, 600.
Popplein v. Foley, 9.
Porter v. City of Dubuque, 427.
Cole, 364.
Hill, 485, 491.
Merrill, 382.
Noyes, 167.
Perkins, 485.
Sevey, 281.
Smith, 444.
Williams, 319.
Posner v. Bayless, 246.
Potter v. Chaplin, 34.
Dooley, 289.
Gardner, 461.
McDowell, 37, 287.
Mercer, 304.
Stevens, 471.
Taylor, 166.
Titcomb, 532.
Potts v. Delaware Water Power Co., 376.
Plaisted, 483, 484.

Powe v. McLeod, 32.
Powell v. Clark, 173.
Hopkins, 413, 509.
Monson Manufacturing Co., 167, 181, 182.
Smith, 473, 496, 497.
Tuttle, 513.
Powers v. Andrews, 478.
Clarkson, 3.
Dennison, 165.
Hale, 9.
Jackson, 108.
Kueckhoff, 512.
McFerran, 286.
Poweshiek Co. v. Dennison, 496.
Powis v. Smith, 314.
Pratt v. Bank of Bennington, 470, 471.
Clark, 427.
Clemens, 193.
Curtis, 37.
Huggins, 479.
Myers, 37.
Skolfield, 470.
Praut v. Vaughn, 36.
Pray v. Pierce, 56.
Stebbins, 33.
Prentiss v. Warne, 387.
Presbury v. Hull, 528.
Preschbaker v. Feaman, 414.
Prescott v. Hawkins, 89.
Hayes, 256, 444.
Otterstatter, 353, 357.
Trueman, 164, 165, 166, 167.
White, 167.
President v. Myers, 69.
Preston v. Hodgen, 478.
Nash, 280, 284.
Walker, 449.
Prestwick v. Marshall, 233.
Prettyman v. Goodrich, 208.
Walston, 296, 358.
Wilkey, 173.
Prevost v. Gratz, 19.
Prevot v. Lawrence, 309, 312.
Prewit v. Wilson, 37.
Price v. Deal, 177.
Furman, 25.
Haynes, 200.
Karnes, 416.
Pittsburg, etc. R. R., 7.
P. & Ft. W., etc. R. R., 225.
Sturgis, 4.
Williams, 304.
Prichard v. Atkinson, 167.
Pridgen v. Pridgen, 542.
Primm v. Walker, 31, 105.
Princeton Loan and Trust Co. v. Munson, 496, 511.
Pringle v. Dunn, 74, 252, 271, 282.
Witten, 165.
Printup v. Turner, 31.
Prite v. Kneale, 182.
Probasco v. Johnson, 426.
Proctor v. Thrall, 491.
Prout v. Roby, 33.
Prouty v. Eaton, 497.
Price, 485.
Pruden v. Paxton, 571.
Prutsman v. Baker, 205, 211, 214.
Pry v. Pry, 271.
Pryor v. Wood, 472.
Pugh v. Good, 8.
Holt, 415.
Pullen v. Shaw, 19.
Purcell v. Hannibal & St. Joe R. R. Co., 167.
Purcell v. English, 353.
Purdie v. Whitney, 458.
Purdy v. Huntington, 470, 473.
Pursly v. Hays, 25.
Puryear v. Reese, 559.
Putnam v. Bond, 101.
Putzel v. Van Brunt, 87, 92.

Q.

Quackenboss v. Clarke, 349.
Quartermous v. Kennedy, 476.
Quimby v. Boyd, 256.
Quincy v. C., B. & Q. R. R., 438.
Quinn v. Champagne, 4.

R.

Rabsuhe v. Lack, 79.
Race v. Weston, 9.
Rackleff v. Norton, 257.
Rader v. Neal, 9.
Rafferty v. Longee, 4.
Ragsdale v. Robinson, 21.
Railroad Co. v. Elliott, 504.
Schurmeir, 105.
Rainbolt v. East, 37.
Raines v. Walker, 204.
Rake v. Lawshee, 27.
Rakestraw v. Rakestraw, 154.
Ralls v. Graham, 286.
Ralston v. Hughs, 451.
Ramsey v. Merriam, 512.
Randall v. Bradley, 477.
Ghent, 78.
Hazelton, 511.
Rick, 387.
Vroom, 36.
Randolf v. New Jersey West Line R. R. Co., 438.
Randolph v. Kinney, 164.
Rank v. Hanna, 182.
Rankert v. Clow, 397.
Rankin v. Ingwersen, 353.
Major, 470.
Miller, 278.
Warner, 74.
Ranlet v. Cook, 354.
Ranney v. McMullen, 466.
Rantin v. Robertson, 352.
Rapier v. Gulf City Paper Co., 417.
Rathbone v. Clarke, 512.
Dyckman, 570.
Rathbun v. Rathbun, 208.
Rathell v. Grimes, 36.
Ratliff v. Mars, 82.
Raverty v. Fridge, 265.
Rawson v. Hall, 443.
Uxbridge, 126.
Ray v. Walton, 542, 549.
Raybold v. Raybold, 146.
Raymond v. Coffey, 97.
Raymond, 164, 165, 171.
Rayuor v. Selmes, 479.
Wilson, 386.
Rea v. Minkler, 168.
Reade v. Livingston, 37.
Reader v. Helms, 4.
Ready v. Kearsley, 67, 136.
Noakes, 9.
Reagan v. Hadley, 493.
Reasoner v. Edmondson, 165.
Reavis v. Reavis, 221.
Rebhan v. Mudler, 557.
Recknagle v. Schmez, 8.
Rector, etc. v. Higgins, 358.
Redd v. Hargraves, 570.
Reddick v. Gressman, 408.
Redfield v. Utica & S. R. R., 308.
Redman v. Graham, 220.
Redwine v. Brown, 162.
Reece v. Allen, 458.
Reed v. Cosale, 271.
Cure, 36.

Reed v. Douthitt, 205, 213.
Kemp, 251, 252, 271.
Lansdale, 479.
Marble, 470.
Morrison, 182.
Pierce, 176.
Reed, 9, 415.
Watson, 541,
Woodward, 540.
Reeder v. Barr, 74.
Reese v. Cochran, 312.
Medlock, 237.
McQuilkin, 170.
Probate Court, 548.
Reeve v. Crosby, 542.
Reeves v. Scully, 472.
Webster, 33.
Reichart v. McClure, 287.
Reid v. Borland, 547.
Reilly v. Chouquette, 155.
Reimeman v. Robb, 472.
Reinicker v. Smith, 30, 31.
Remsen v. Brinckerhoof, 542,
Conklin, 336.
Renfro v. Adams, 491.
Harrison, 214.
Renond v. Daskam, 354.
Re Phillips, 542.
Repp v. Repp, 427.
Revalk v. Kraemer, 183.
Rewalt v. Ulrich, 571.
Rex v. Creel, 170
Longnor, 168.
Reymond v. Hillhouse, 576.
Reynal, *Ex parte*, 438.
Reynolds v. Canal & Banking Co. of N. O., 411.
Kingsbury, 265, 271.
Rowley, 236.
Vilas, 79.
Rhine v. Ellen, 79.
Robinson, 213.
Rhode v. Loutham, 230.
Rhodes v. Parker, 496.
Vinson, 549.
Rice v. Brown 304, 458, 508.
B. & W. R. Co., 339.
Cribb, 443.
Dudley, 357.
Grove, 246.
Peet, 3.
Rich v. Roberts, 282.
Zeilsdorff, 118.
Richard v. Bent, 164, 166, 167.
Boller, 194.
Chace, 183.
Richards v. Holmes, 513, 514.
Richardson v. Barrick, 415.
Bates, 364.
Bright, 25.
Cambridge, 486.
Dorr, 164, 165, 166.
Hockenhull, 473.
Palmer, 91, 95, 118.
Pate, 27.
Ridgely, 422.
Stodder, 136.
Woodbury, 416.
Richman v. Lippincott, 58.
Richmond v. Aiken, 497.
Tibbels, 33.
Ricketson v. Richardson, 444.
Riddell v. Johnson, 559.
Riddle v. Littlefield, 361.
Riddlesburg, etc. Coal Co. v. Rogers, 101.
Ridgeway v. Holliday, 173, 285.
Ridley v. McNairy, 8.
Riecke v. Westenhoff, 183.
Riehl v. Bingenheimer, 136.
Riggin v. Green, 26.
Love, 114.
Riggs v. Boylan, 289.
Fisk, 25.
Riggs, 542.
Rigler v. Cloud, 212.
Rigney v. Lovejoy, 471.
Riley v. Chouquette, 197.
Minor, 230.
McCord, 502.
Rilling v. Thompson, 443.
Rindskopbf v. Farmer's Loan Co., 168, 170.
Ring v. Burt, 183.
Rippy v. Gant, 26.
Ritter v. Phillips, 465, 466.
Rivard v. Gisenhof, 115.
Rivard v. Walker, 205, 209, 214.
Roach v. Wadham, 156.
Robbins v. Cookendorfer, 181.
Eaton, 25.
McMillan, 73.
Sackett, 409.
Webb, 162.
Roberts v. Cooper, 24.
Davy, 382.
Fleming, 478, 480, 514.
Forsythe, 85.
Jackson, 222.
Littlefield, 477.
McMahan, 416.
Pillow, 194.
Swearingen, 213.
Welch, 486, 497, 541, 542.
Wiggin, 25, 310.
Wilcoxsen, 27.
Robertson v. Cambell, 417.
French, 15.
Hay, 18.
McAfee, 74.
Stark, 444.
St. John, 354.
Robeson v. Hornbak r, 2.
Robie v. Smith, 381.
Robins v. Swain, 473.
Robinson v. Clark, 37.
Cook, 481.
Cropsey, 417.
Davenport, 183.
Eagle, 33.
Farrelly, 415.
Gould, 204, 214.
Harboun, 174.
Holt, 37.
L'Engle, 357.
Loomis, 443, 445.
Mauldin, 236.
Meyers, 19.
Perry, 570.
Randolph, 33, 581.
Robards, 36.
Ryan, 479, 480.
Sampson, 493.
Schly, 520.
Smith, 542.
Thrailkill, 3.
United States, 5.
Urquhart, 426.
Willoughby, 415.
Robsuhl v. Luck, 79.
Roche v. Farnsworth, 512.
Rockhill v. Rockhill, 486.
Rockwell v. Brown, 78, 79.
Hobby, 426.
Rockwood Manf. Co. v. Master, 36.
Rodes v. Bronson, 484.
Rodgers v. Burchard, 278, 284, 285.
Roe v. Mound, 273.
Moore, 36.
Neal, 278.

Roehl v. Haumesser, 4.
Roebuck v. Dupuy, 173.
Rogan v. Docking, 353.
Rogan v. Walker, 415.
Rogers v. Blackwell, 26.
Boynton, 388.
Burchard, 286.
Carey, 207, 209, 214.
Cox, 3.
Cross, 472.
Diamond, 542.
DeForest, 483.
Eagle Fire Co., 55, 56, 116.
Evans, 36.
Haskins, 281.
Herron, 480.
Hillhouse, 49, 59, 77.
Humphreys, 315.
Jones, 279, 280, 281.
McKenzie, 370.
Renshaw, 183.
Smith, 582.
Traders' Ins. Co., 483.
Wiley, 283.
Woody, 182.
Rollins v. Moody, 357.
Riley, 53, 78, 136.
Rollwagen v. Rollwagen, 526, 540.
Roney v. Moss, 260.
Rood v. Winslow, 443.
Roof v. Stafford, 25, 310.
Rooney v. Michael, 27.
Roosevelt v. Heirs of Fulton, 429.
Thurman, 571.
Root v. Wheeler, 458.
Rootes v. Holliday, 221.
Roper Hus. and Wife, 32.
Roper v. Roper, 576.
Rose v. Brown, 37.
City of Bridgeport, 448.
Daniel, 25.
Kimball, 470.
Rose, 550.
Rosenthal v. Griffin, 260.
Rosevelt v. Bank of Niagara, 472.
Ross v. Adams, 45.
Demoss, 514.
Dysart, 84, 173.
Kennison, 466.
Mitchell, 497.
Whitson, 427.
Rossetter v. Simmons, 186, 580.
Rotch v. Miles, 312.
Rottman v. Wasson, 230.
Rover, *In re*, 571.
Rowan v. Lytle, 386.
Rowe v. Beckett, 59, 83, 285.
Hamilton, 32.
Heath, 171, 177.
Ware, 230.
Rowell v. Michell, 483.
Rowland v. Rowland, 182.
Rowley v. Brown, 513.
Rownell v. De Wolf, 554.
Roy v. Garnett, 115.
Hill, 527.
Royce v. Guggenheim, 389.
Rubens v. Prindle, 445.
Rucker v. Lambdin, 542.
Ruckman v. Alwood, 415.
Rudd v. Van Orden, 415.
Rudden v. McDonald, 542.
Rudisill v. Rodes, 553.
Ruffler v. Womack, 417.
Ruggles v. Barton, 469, 470.
Williams, 416.
Rumpp v. Gerkens, 473.
Rundell v. Lakey, 167.
Runlet v. Otis, 414.
Runnels v. Webber, 166, 167, 176.
Runyan v. McClellan, 287.
Mercereau, 401.
Rupp v. Eberly, 571.
Ruppe v. Stemboche, 31.
Rush v. Lewis, 152.
Russ v. Perry, 166, 167.
Steele, 170.
Russell v. Baptist Theological Union, 263.
DeGrand, 390.
Duflow, 461.
Erwin, 309.
Fabyan, 388.
Hammond, 37.
Jersey Co., 105.
Kinney, 465.
Rumsey, 181.
Schurmier, 5.
Southard, 416, 417.
Sweezey, 280.
T. & P. R. R., 33.
Topping, 34.
Waite, 472.
White, 472.
Whitely, 515.
Rutgers v. Hunter, 354.
Ruth v. Ford, 78.
Rutherford v. Rutherford, 542.
Tracy, 108.
Williams, 511, 514.
Ryan v. Carr, 249.
Davis, 9.
Ryder v. Jenny, 354.
Ryers v. Wheeler, 574.
Ryerson v. Chapman, 170.
Rymes v. Clarkson, 540.

S.

Sacheverell v. Froggatt, 330.
Sadler v. Anderson, 213.
Sage v. Riggs, 443.
Wilcox, 4.
Sager v. Tupper, 484.
Salem v. Edgerly, 467, 481.
Sales v. Smith, 513.
Salisbury v. Shirley, 375.
Salmon v. Bennett, 37.
Vallejo, 164.
Salter v. Jonas, 104.
Sampson v. Williamson, 183.
Samual v. Marshale, 26.
Peyton, 465.
Samuels v. Borrowscale, 251.
Sanborn v. Adair, 273.
Mueller, 108.
Sander v. Morrow, 273.
Sanders v. Godcing, 106.
Partridge, 369, 370, 373.
Sanderson v. Jackson, 15, 16.
Price, 408, 411.
Sands v. Church, 74.
Hughes, 370.
Sanford v. Bulkley, 260.
Handy, 235.
Jackson, 535.
McLean, 27.
Sanger v. Bancroft, 470.
Craigue, 289.
Sangster v. Love, 471.
Saonders v. Wagonseller, 76.
Sappington v. Oeschli, 287.
Sarah Miles' Will, 541.
Sargent v. Howe, 458, 508.
Smith, 350.
Sasser v. McWilliams, 32.
Saunders v. Frost, 452.
Hackney, 15, 68.
Jackson, 6.

Saunders v. Stewart, 410.
Wakefield, 4.
Savage v. Pix, 246.
Savage, 27.
Savery v. Browning, 287.
Sawyer v. Adams, 271, 291.
Cox, 191, 253.
Dodge County Ins. Co., 5.
Dozier, 542.
Lyon, 467.
Peters, 20.
Saxton v. Hitchcock, 417.
Sayles v. Smith, 512.
Scanlan v. Turner, 182.
Wright, 33.
Searle v. Sawyer, 407.
Schade v. Bessinger, 416.
Schadel v. St. Martin, 443.
Schafer v. Reilly, 443, 472.
Scharfenburg v. Bishop, 260.
Schell v. Stein, 291.
Schermerhorn v. Talman, 419.
Schiffer v. Feagin, 443.
Schlatre v. Greand, 465.
Schley v. Fryer, 464.
Pullman Car Co., 27, 260.
Schmeling v. Kriesel, 5, 9.
Schmidt v. Opie, 36.
Schmucker v. Schmidt, 520.
Sibert, 466, 497.
Schneider v. Norris, 6.
Schnitz v. McManamy, 21.
Schofield v. Iowa Homestead Co., 164.
Walker, 526.
School District v. Aetna Ins. Co., 236.
Milligan, 3.
School Committee v. Kesler, 186.
Schoonmaker v. Taylor, 415.
Schramm v. Gentry, 260.
Schroeder v. Gurney, 287.
Walsh, 36.
Schultz v. Moore, 271.
Schutt v. Large, 279.
Schuyler v. Hoyle, 372.
Schuylkill, etc. R. R. v. Schmoele, 173, 344.
Schuylkill Co. v. Thoburn, 487.
Scituate v. Hanover, 146, 414.
Scott v. Buchanan, 310.
Featherston, 465.
Frink, 476.
Gallagher, 258.
Henry, 414.
Kirkendall, 168, 170.
Leather, 271.
Scott, 163.
Simons, 183.
Tiviss, 165.
Turner, 471.
Tyler, 124.
White, 3.
Scranton v. Booth, 329.
Scribner v. Holmes, 167.
Lockwood, 287.
Scrugham v. Wood, 205, 213.
Seabrook v. Moyer, 389.
Seabury v. Brewer, 576.
Sears v. Brink, 4.
Dixon, 183.
Russell, 535.
Smith, 427.
Secular v. Fox, 165.
Sedgwick v. Hollenbeck, 165.
See v. Derr, 85.
Seekright v. Carrington, 582.
Seemes v. Seemes, 549.
Seguine v. Seguine, 542.
Seitzinger v. Weaver, 173.
Sellers v. Sellers, 15.
Sernon v. Terhune, 272.
Seton v. Slade, 9.
Seuzeneau v. Saloy, 443.
Severance v. Griffith, 435.
Severy v. C. P. R. R., 104.
Sewell v. Haymaker, 27.
Sexton v. Anderson, 36.
Wheaton, 36, 37.
Seyfert v. Bean, 366.
Seymour v. Delancey, 9.
Shackelford v. Hall, 125.
Shaddle v. Disborough, 9.
Shaeffer v. Chambers, 180.
Shafer v. Bear River, etc. Mining Co., 435.
Shall v. Biscoe, 427.
Shand v. Handley, 37.
Sharkey v. Snarkey, 415.
Sharon Iron Co. v. Erie, 126.
Sharp v. Barker, 443, 451.
Emmett, 7.
Hamilton, 260.
Sharpe v. Orme, 200, 259, 260.
Shattuck v. Hastings, 124.
Shaw v. Erskine, 414.
Farnsworth, 304, 313.
Gray, 502.
Hayward, 225.
Loud, 67, 496.
Millsops, 36.
Norfolk Co. R. R. Co., 502.
Poor, 252.
Russ, 182.
Shawment Nat. Bank v. Boston, 357.
Shays v. Norton, 415.
Sheafe v. Gerry, 444.
Shearer v. Ranger, 167.
Sheehan v. Davis, 197.
Sheets v. Grubbs, 577.
Selden, 84, 380, 382.
Shelby v. Hearne, 348.
Sheldon v. Stryker, 260.
Shelley v. Boothe, 36.
Shelley's Case, 115
Shelton v. Armor, 180, 195.
Codman, 345.
Pease, 173.
Shelton's Case, 221.
Shepard v. Carriel, 260.
Spaulding, 388.
Shepherd v. Bevin, 9.
Howard, 182.
May, 464.
McClain, 483.
Nabors, 575.
Shepherd, 444.
Sheppard v. Harrison, 21.
Thomas, 37, 124.
Sherburne v. Shaw, 6.
Sheridan, *Re*, 542.
Sheridan v. Welch, 470.
Sherman v. Champl. Tr. Co., 385.
Dill, 10.
Dodge, 136.
Hogland, 32.
Sherman, 491.
Williams, 327.
Shermer v. Merrill, 465.
Sherwood v. Elslow, 485.
Hassal, 359.
Reade, 511.
Wilson, 491.
Shewalter v. Pirner, 95.
Shields v. Lozear, 408, 411, 476, 483.
Trammell, 9.
Shiffner v. Gordon, 390.
Shillaber v. Robinson, 415.
Shinn v. Fredericks, 473.
Roberts, 124.
Shirley v. Ayers, 226, 227.

Shirley v. Fearne, 31, 200.
Shively v. Black, 1.
Shook v. Pate, 103.
Shootz v. Brown, 76.
Short v. Conlee, 260.
Shotts v. Poe, 575.
Shotwell v. Harrison, 281, 288.
Shriener's Appeal, 571.
Shubert v. Stanley, 416.
Shubrick v. Salmond, 161.
Shuetz v. Bailey, 220.
Eggers, 5.
Shuler v. Hardin, 465.
Shultz v. Moore, 252, 258.
Morgan, 36.
Shumway v. Collins, 382.
Shurtleff v. Francis, 470.
Sicard v. Davis, 213.
Sidenburg v. Ely, 451.
Sidle v. Maxwell, 279.
Sidwell v. Birney, 257.
Siemers v. Schroder, 512.
Sigfried v. Levan, 21.
Sigourney v. Munn, 71, 277, 281.
Sillers v. Lester, 443.
Silloway v. Brown, 453.
Silver Lake Bank v. North, 443.
Silverthorne v. McKinster, 154.
Simmons v. Anderson, 183.
Fuller, 438.
Simmons, 213, 554.
Spratt, 67.
Thomas, 327.
Simms v. Hervey, 18, 21.
Read, 271.
Simon v. Kaliske, 271, 289.
Simonds v. Turner, 358, 376.
Simons v. Farren, 360.
Simonton's Estate, 224.
Simonton v. Gray, 107, 473.
Thompson, 101,
Simpson v. Graves, 36.
Margitson, 5.
McGlathery, 227.
Montgomery, 264.
Mundee, 193, 249, 251, 252, 271.
Robert, 443.
Smith, 571.
Sims v. Baldwin, 25.
Dawe, 31.
Hammond, 471.
Hampton, 380.
Rickets, 32.
Smith, 25.
Sinclair v. Jackson, 231, 309.
Singleton v. Scott, 513.
Sisters of Charity v. Kelly, 541.
Sitton v. Shipp, 8.
Skaggs v. Emerson, 389.
Skerritt's Estate, 540.
Skinner v. Baker, 226.
Cox, 442.
Dayton, 9.
Fulton, 261.
Smith, 477.
White, 9.
Wood, 585.
Skipwith v. Dodd, 2.
Slade v. Etheridge, 104.
Slater v. Rawson, 162, 164, 165.
Slaughter v. Cunningham, 25.
Stephens, 549.
Slee v. Manhattan Co., 510.
Slicer v. Bank of Pittsburg, 477.
Slingerland v. Slingerland, 8.
Sloan v. Coolbough, 509.
Lawrence Furnace Co., 118.
Sloat v. Bean, 445.
Slowey v. McMurray, 417.
Slutz v. Desenberg, 417.
Small v. Edrick, 380.
Smalley v. Lawrence, 33.
Smiley v. Fries, 204.
Gambill, 549.
Van Winkle, 369.
Smith v. Allen, 76, 210.
Arnold, 4.
Austin, 478.
Bank, 49.
Barrie, 122.
Bell, 571.
Blaisdell, 382.
Burnham, 31.
Burtis, 368.
Cannell, 448.
Cremer, 425.
Crooker, 21.
Dall, 290.
Devlin, 386.
Dickinson, 230.
Dixon, 170.
Dunton, 285.
Elliot, 26.
Evans, 25.
Garden, 260.
Goodwin, 450.
Hall, 279.
Handy, 182.
Hollenbeck, 146.
Howell, 6.
Hunt, 249, 259.
Kelly, 470, 479, 483.
Kerr, 345, 353.
Lambeth, 283.
Leiberling, 32.
Lowry, 491.
McCampbell, 167, 176.
McGowan, 119.
Moore, 471.
Niver, 387.
Otley, 483.
Perry, 230.
Pollard, 59.
Porter, 472.
Prewitt, 103.
Provin, 478.
Putnam, 361.
Roberts, 473.
Rowland, 427.
Scribner, 170.
Smith, 33, 37, 582.
South Royalton Bank, 226.
Sprague, 167, 170.
Stanley, 182.
Starr, 472.
Stigleman, 389.
Strong, 165, 175.
Swan, 473.
Vincent, 483.
Wait, 549.
Weed, 18.
Whitfield, 36.
Yule, 280.
Snavely v. Pickle, 416, 443.
Sneed v. Ewing, 600.
Warning, 31.
Snell v. Iron Homestead Co., 177.
Mitchell, 9.
Snider v. Lackenour, 208.
Snodgrass' Appeal, 30.
Snodgrass v. Ricketts, 284.
Snow v. Orleans, 24.
Snowden v. Pitcher, 414.
Snyder v. May, 3.
Robinson, 466.
Sponable, 231.
Wolford, 3.
Society v. Varick, 69.

Somers v. Pumphrey, 26, 205, 221, 311.
Schmit, 170.
Skinner, 169.
Somersworth v. Roberts, 415.
Somersworth Savings Bank v. Roberts, 444.
Sonfield v. Thompson, 260.
Soper v. Guernsey, 443.
Soule v. Albee, 414.
Southard v. Central R. R., 126, 127.
Southbridge Sav. Bank v. Mason, 438.
South Carolina v. Georgia, 105.
Southerin v. Mendum, 407, 471.
Southerland v. Hunter, 253.
Stout, 16
Southern Life Ins., etc. Co. v. Cole, 224.
Southworth v. Smith, 484.
Soutter v. Miller, 424.
Sowyerbye v. Arden, 205. 211, 221, 226.
Spader v. Lawler, 443.
Spalding v. Conzelman, 8.
Hallenbeck, 76.
Sparhawk v. Sparhawk, 542.
Sparkman v. Place, 37.
Sparrow v. Hardcastle, 550.
Hovey, 268.
Speake v. United States, 18, 21.
Spear v. Fuller, 335, 337, 382.
Spears v. Sewell, 26.
Speck v. Riggin, 283.
Spear v. Evans, 279, 291.
Hadduck, 515.
Spence v. Dunlap, 37.
Steadman, 416.
Spencer's Case, 350.
Spencer v. Ayrault, 449.
Carr, 209.
Field, 7, 246.
Godwin, 32.
Marlborough, 152.
Pierce, 449.
Sperry v. Sperry, 386.
Spicer v. Ayres, 37.
Spirett v. Willows, 37.
Spitts v. Wells, 48.
Spitznagle v. Vanhesoeh, 260.
Splawn v. Martin, 36.
Spofford v. Hobbs, 239.
Weston, 281, 283.
Sponable v. Snyder, 283.
Spoonemore v. Cables, 512, 549.
Sprague v. Baker, 170.
Graham, 472.
Springer v. Bartle, 285.
Kleinsorge, 4.
Springfield Savings Bank v. Society, 425.
Springle v. Shields, 9.
Springstein v. Schermerhorn, 384.
Staats v. Bigelow, 508.
TenEyck, 177.
Stack v. Sigelkow, 70.
Stackbridge Iron Co. v. Hudson Iron Co. 118.
Stackpole v. Arnold, 7, 245, 246.
Robbins, 79, 485.
Stacy v. Bostwick, 388.
Stafford v. Lick, 238.
Roof, 310.
Stafford, 76, 78.
Van Rensselaer, 427.
Stagg v. Eureka Tanning Co., 388.
Green, 586.
Stahl v. Berger, 21.
Stalworth v. Blum, 454.
Stamland v. Hopkins, 98.
Stanard v. Barnum, 571.
Eldridge, 165.
Stanclift v. Norton, 445, 451.
Stanhope v. Manners, 145.
Stanley v. Greene, 88, 90.
Snyder 36.
Valentine, 493.
Stanton v. Button, 260.
Miller, 223, 226.
Stantons v. Thompson, 473.
Stanwood v. Dunning, 182.
Stappleton v. Stappleton, 559.
Stark v. Coffin, 104, 484.
Starkweather v. American Bible Society, 33.
Martin, 180.
Starr v. Ellis, 383, 473.
State Bank v. Whittle, 36.
State v. Boston, 33.
Clough, 479.
Evans, 36.
Joyce, 571.
Martin, 376.
Plaisted, 25.
Ragland, 407, 411.
Wilcox, 541.
Wilson, 118.
State of Connecticut v. Bradish, 364.
State of New Jersey v. Thatcher, 224, 225.
Steadman v. Guthrie, 4.
Taylor, 4
Stearns v. Godfrey, 127, 128.
Hubbard, 2.
Swift, 181, 182.
Stebbins v. Duncan, 274.
Hall, 464.
Merritt, 197.
Wolf, 177.
Steel v. Steel, 60, 415, 442.
Steele v. Boone, 289.
Carroll, 407.
Mansell, 273.
Miller, 200.
Steeple v. Donning, 24.
Steere v. Steere, 146.
Steiner v. McCall, 443.
Stelle v. Andrews, 449.
Stembridge v. Stembridge, 9.
Stephens v. Allen, 416.
Graham, 18.
Huss, 208, 211.
Ill. Mut. Fire Ins. Co. 452, 477.
Rinehart, 211.
Sherrod, 182.
Sterling v. Peet, 177.
Steven's Appeal, 427.
Stevens v. Brown, 271.
Buffalo, etc. R. R. Co., 443.
Church, 465.
Cooper, 481, 492.
Doe, 260.
Hampton, 249, 252, 271.
Hatch, 205.
Owen, 181.
Robinson, 37.
Stevenson v. Adams, 491.
Black, 465, 471.
Buxton, 9.
Cloud, 249.
Crapnell, 224.
Maxwell, 9.
Steward v. Winters, 360.
Stewart v. Aeley, 36.
Barrow, 401, 409.
Beard, 200.
Crosby, 483.
Dailey, 36.
Drake, 166, 170, 177.
Flint, 26.
Hadley, 170.
Hall, 278.
Harriman, 542.

Stewart v. Iglehart, 36.
Jackson, 37.
Long Island R. R. Co., 369.
Mackey, 183.
Matthews, 249.
McSweeny, 271.
Redditt, 205.
Weed, 208, 209, 214.
Stickey v. Jordan, 449.
Stiles v. Probst, 18, 206.
Stillwell v. McDonald, 287.
Stimmel v. Waters, 375.
Stincheomb v. Marsh, 232.
Stine v. Wilkson, 512.
Stinson v. Ross, 407.
Sumner, 181.
Stirling v. Stirling, 541.
Stith v. Barnes, 574.
Stivers v. Home, 285.
St. John v. Bumpstead, 511.
Conger, 278.
Quitzow, 388.
St. Louis v. Wiggins' Ferry Co., 206, 213.
St. Louis Hosp v. Wegman, 541.
Stobie v. Dills, 387.
Stockbridge Iron Co. v. Cone Iron Works, 339.
Stockton v. Williams, 24.
Stockwell v. Hunter, 357, 389.
McHenry, 291.
Stoddard v. Hart, 443.
Stoddert v. Tucks, 8.
Stoever v. Stoever, 414.
Stoffel v. Scroeder, 59, 285.
Stokeley v. Thompson, 449.
Stokes v. O'Fallon, 551.
Stone v. Bartlett, 283, 286.
Bennett, 449.
Duvall, 211, 220.
French, 205.
Houghton, 126.
Locke, 470.
Montgomery, 263.
Myers, 37.
Patterson, 407.
Stone, 260.
Stoner v. Evans, 449.
Storey's Will, 542.
Storms v. Storms, 444.
Storr v. Wakefield, 443.
Story v. Storley, 32.
Stott v. Rutherford, 326, 388.
Stouffer v. Coleman, 10.
Stoughton v. Pasco, 444.
Stout v. Jackson, 177.
Stoutenburgh v. Moore, 576.
Stovall v. Barnett, 76.
Farmer's Bank, 36.
Stover v. Kendall, 549, 554.
Wood, 493.
Stow v. Tifft, 182.
Wyse, 73, 236.
Stowell v. Bonswell, 88.
Pike, 450.
Straight v. Harris, 492.
Strange v. Graham, 73.
Strauss v. Abrahams, 36.
Strawn v. Norris, 20.
Stringer v. Northwestern Life Ins. Co., 25.
Stringham v. Brown, 509.
Stroble v. Smith, 50.
Strong v. Blanchard, 480.
Converse, 465.
Jackson, 472.
Lynn, 285.
Manufacturers' Ins. Co., 452.
Richard, 380.
Smith, 249, 251, 252.
Strother v. Law, 458, 510.
Stuart v. Baker, 25.
Stubblefield v. Sarle, 357.
Stubbs v. Houston, 550.
Stultz v. Dickey, 297.
Stump v. Deneale, 580.
Sturtevant v. Phelps, 176.
Sturtevant, 417.
Stuyvesant v. Davis, 382.
Hall, 279.
Mayor, 382.
Succession of CoXe, 170.
Norton, 486.
Suffern v. Butler, 186.
Suiter v. Turner, 271.
Sullivan v. Sullivan, 542.
Tuck, 9.
Sulton, *Ex parte*, 7.
Summers v. Roos, 443, 444.
Sumner v. Murphy, 36.
Williams, 112, 173, 326.
Sunderlin v. Struthers, 73.
Sutphen v. Cushman, 416.
Suttles v. Hay, 20.
Sutton v. Mason, 108.
Myrick, 9.
Suydam v. Jones, 348.
Swafford v. Whipple, 177.
Swain v. Seamans, 5.
Swaine v. Perine, 37.
Swan v. Hammond, 551.
Yaple, 471, 485.
Swarthout v. Curtis, 490.
Swartz v. Ballow, 21.
Leist, 471.
Swasey v. Brooks, 164.
Swazey v. Brooks, 112.
Sweeney v. Garrett, 336.
Sweet v. Brown, 171.
Parker, 416.
Sweet, 549.
Sweetser v. Lowell, 65, 264.
Swetland v. Swetland, 414.
Swett v. Horn, 483.
Patrick, 177.
Swift v. Lee, 582.
Tyson, 76.
Swisher v. Williams, 39.
Sykes v. Batee, 8.
Sykes, 182.
Symms v. Moulton, 585.
Syracuse City Bank v. Tallman, 407.

T.

Tabb v. Baird, 24.
Tackson v. Clark, 96.
Taggart v. Risley, 169.
Stanberry, 236
Wade, 478.
Talbert v. Dull, 260.
Talbot v. Simpson, 260.
Whipple, 387.
Talcott v. Talcott, 576.
Talliaferro v. King, 449.
Talmadge v. R. & S. R. Co., 3.
Tallman v. Bresler, 370.
Cook, 205.
Tantum v. Green, 472.
Tarbell v. Tarbell, 580.
Tarpey v. Deseret Salt Co., 33.
Tartt v. Clayton, 512.
Tarver v. Haines, 586.
Tasker v. Bartlett, 194.
Tate v. Gray, 108.
Lawrence, 202.
Stoolitzfoos, 265.
Tatem v. Chaplin, 348.
Tatum, 10, 14, 83.
Young, 271.

Taylor v. Baldwin, 427.
Bassett, 181.
Cole, 491.
Cornelius, 443.
De Bus, 375.
Eatman, 37.
Glenny, 312.
Harrison, 271.
Holter, 177.
Kelley, 520.
Lowenstein, 280.
Luther, 416.
Mason, 125.
McDonald, 230.
Morton, 193.
Owen, 348.
Page, 472.
Porter, 479.
Preston, 160.
Reid, 512.
Robinson, 210.
Short, 492.
Sutton, 124.
Taylor, 29, 542.
Williams, 9.
Zamira, 358.
Teal v. Walker, 407, 415.
Teetshorn v. Hull, 438.
Temple v. Johnson, 8.
Templeman v. Biddle, 297.
Tenant v. Blacker, 230.
Tenny v. Lumber Co., 197.
Terrell v. Andrew County, 259.
Imboden, 36.
Terrett v. Taylor, 169.
Terrio v. Guidry, 491.
Terry v. Drabenstadt, 177.
Eureka College, 496.
Rosell, 407, 411.
Tewksbury v. O'Connell, 218.
Tharp v. Brenneman, 236.
Thatcher v. Omans, 32.
St. Andrew's, 205.
Thayer v. Clemence, 164, 166.
Mann, 497.
Torrey, 109, 464.
Turner, 38.
Waples, 388.
The Montello, 105.
The Mutual Benefit Life Ins. Co. v. Brown, 190.
The National Union Bank v. Segur, 162.
Tholen v. Duffy, 449.
Thomas v. Blackemore, 365.
Hammond, 4.
Hooker-Colville Pump Co., 358.
Jones, 514.
Marshfield, 67.
Nelson, 387.
Record, 124.
Turvey, 88.
Von Kapff, 359, 452.
White, 575.
Wyatt, 69.
Thomasson v. Townsend, 443.
Thompkins v. Hyatt, 8.
Thompson, *In re*, 548.
Thompson's Appeal, 571.
Thompson v. Bertram, 466.
Bowman, 31.
Dougherty, 37.
Gibson, 136.
Hamilton, 3.
Hammond, 205.
Hawley, 9.
Hawks, 526.
Hook, 533.
Houze, 508.
Jamesson, 2.
Thompson v. Leach, 384.
Lee, 449.
Ludington, 575.
Lyan, 153.
Mills, 32.
Murray, 153.
Pioche, 388.
Rose, 376.
Seastedt, 542.
Spencer, 59.
The Mayor, etc., 308.
Thompson, 20, 65, 76, 78, 126.
Wilcox, 101.
Wilson, 386.
Thornburg v. Jones, 512.
Masten, 4.
Thorndell v. Morrison, 312.
Thorndike v. United States, 484.
Thorp v. Keokuk Coal Co., 59, 466.
Thornton v. Boyden, 513.
Irwin, 458, 490, 491, 514.
Nat. Ex. Bank, 484.
Payne, 304.
Trammell, 126.
Thrall v. Newell, 95.
Throckmorton v. Price, 289.
Thurmun v. Cameron, 24, 260.
Jenkins, 413.
Thursby v. Plant, 348.
Tibbals v. Jacobs, 214.
Tibbits v. Percy, 353.
Tibeau v. Tibeau, 20, 417.
Tice v. Annin, 500.
Freeman, 4.
Tiehenor v. Dodd, 464, 465.
Tiernan v. Gibney, 9.
Poor, 9.
Tiffany v. Glover, 260.
Tileston v. Newell, 174.
Tilford v. Fleming, 377.
Tillman v. Cowand, 252, 271.
Tillson v. Moulton, 414, 416.
Tilton v. Hunter, 278.
Tilton, 8.
Tilyon v. Reynolds, 388.
Timen v. Claffey, 549.
Tio v. Vance, 357.
Tipton v. Ross, 205.
Tisdale v. Conn. Mut. Life Ins. Co., 557.
Tisher v. Beckwith, 206.
Titley v. Wolstenholme, 458.
Todd v. Jones, 260.
Summers, 174.
Tomlin v. Dubuque, etc. R. R. Co., 105.
Tompkins v. Corwin, 18.
Elliott, 174.
Tompkins, 496.
Wheeler, 208, 212, 214.
Tone v. Brace, 84.
Toney v. McGehee, 37.
Tong v. Matthews, 177.
Tooke v. Newman, 512, 550.
Tooker v. Sloan, 263.
Toomer v. Dawson, 4.
Randolph, 411.
Toops v. Snyder, 292.
Tootle v. Caldwell, 36.
Torrett v. Crupps, 6.
Torrey v. Bank of Orleans, 466.
Bowen, 542.
Cook, 500, 510, 512.
Wallis, 348.
Totten v. Brady, 36.
Touchard v. Crow, 59, 256.
Toulin v. Dubuque, etc. R. R. Co., 105.
Tousley v. Tousley, 444.
Tovart v. Hopkins, 513.
Tower v. Divine, 473.
Towle v. Larrabee, 39.

Towles v. Fisher, 155.
Town of Lemington v. Stevens, 364, 365.
Townsend v. Corning, 246.
Downer, 201.
Empire Stone Dressing Co., 143.
Fenton, 8.
Houston, 8.
Hubbard, 246.
Morris, 168.
Reed, 369.
Riley, 449.
Tickell, 209, 214.
Townsend, 557.
Ward, 465.
Wilson, 458.
Trabue v. McAdams, 376.
Tracy v. Albany Exchange Co., 354.
Trafton v. Hawes, 55, 78, 116.
Transue v. Sell, 104.
Trapper v. Harter, 438.
Trask v. Wheeler, 339.
Traveler's Ins. Co. v. Yount, 87.
Travis v. Morrison, 571.
Tyler, 221.
Traynon v. Palmer, 160.
Trayser v. Trustees Indiana Asbury University, 496.
Treadwell v. Reynolds, 204.
Tredwell v. Abraham, 36.
Trenton Banking Co. v. Woodruff, 493.
Trimble v. Coons, 31.
Ward, 327.
Trimmer v. Heagy, 27.
Tripe v. Marcy, 497.
Triplett v. Gill, 164.
Tripp v. Vincent, 466.
Troost v. Davis, 480.
Tropp v. Field, 382.
Trott v. Warren, 36.
Trotter v. Erwin, 427.
Troup v. Troup, 4, 8.
Trubody v. Jacobson, 427.
Trucks v. Lindsey, 417.
Trull v. Bigelow, 288.
Eastman, 171.
Truluck v. Peeples, 257.
Peeples, 288.
Truman v. Love, 190.
Trusdale v. Ford, 280.
Trustees v. Wright, 427.
Trustees of Union College v. Wheeler, 472.
Trutt v. Spotts, 160.
Tryon v. Munson, 407.
Tubbs v. Gatewood, 249, 260.
Tucker v. Allen, 211, 220.
Ball, 571.
Buffum, 480.
Field, 438.
Moreland, 25, 310.
Tucker, 148. 157, 542.
Vandermark, 280.
Tuesley v. Robinson, 36.
Tufts v. Adams, 166, 170.
Tuite v. Miller, 65.
Tully v. Davis, 260.
Tunis v. Grandy, 389.
Tunison v. Chamblin, 37, 76, 213, 263.
Turbeville v. Ryan, 314.
Turman v. White, 115.
Turner v. Cook, 542.
Field, 194.
Johnson, 3, 423, 480.
Kerr, 415.
Turner, 29.
Tyson, 273.
Watkins, 424.
Whidden, 208.
Turnipseed v. Cunningham, 417.
Tustin v. Taught, 190, 218.
Tuten v. Gogan, 258.
Tuthill v. Morris, 484.
Tuttle v. Dewey, 478.
Jackson, 364.
Turner, 204, 213.
Tuxbury v. French, 571.
Twicross v. Fitchburg R. R. Co., 358.
Twitchell v. City, 7.
McMurtrie, 472.
Tyler v. Heidorn, 339.
Moore, 112, 113.
Tyler, 551.
Tyrell's Case, 137.
Tyron v. Munson, 411.

U.

Ufford v. Wilkins, 106.
Uhrig v. Horstman, 33.
Ulp v. Campbell, 182.
Underhill v. Atwater, 443.
Morgan, 32.
Saratoga R. R., 126.
S & W R. R., 124.
Underwood v. Birchard, 352.
United States v. Arredondo, 124.
Bostwick, 345.
Hickey, 376.
Huckabee, 28.
Linn, 19.
Nelson, 21.
U. S. Trust Co. v. Lee, 33.
Union National Bank v. Matthews, 509.
Pinner, 472.
University of Vermont v. Joslyn, 24.
Upchurch v. Upchurch, 542.
Upton v Archer, 21.
Utica & Black River R. R. Co. v. Stewart, 257.

V.

Vail v. Jacobs, 513.
Valentine v. Piper, 236.
Vallandingham v. Johnson, 25.
Valle v. American Iron Mountain Co, 491.
Clemens, 173.
Vanatta v. Brewer, 382.
Van Alstyne v. Van Slyck, 196.
Van Amringe v. Morton, 21.
Van Blarcom, v. Kip, 108.
Vanborn v. Frick, 7.
Van Bramer v. Cooper, 25.
Van Brunt v. Mismer, 435.
Van Buren v. Olmstead, 480.
Vance v. Anderson, 558.
Fore, 198.
Johnson, 411.
Lincoln, 414, 442.
Nogle, 33.
Schuyler, 257, 260.
Van Court v. Moore, 210.
Van Cortlandt v. Kip, 554.
Van Duesen v. Blum, 31.
Sweet, 26, 311.
Vandercook v. Baker, 471.
Vanderkarr v. Thompson, 5.
Vanderkarr, 173.
Vanderkemp v. Shelton, 470, 473.
Vandervoort v. Gould, 312.
Vanderslice v. Knapp, 409.
Van Doren v. Everitt, 297.
Todd, 427.
Vandruff v. Rinehart, 541.
Van Etta v. Evenson, 21.
Van Hauswick v, Wiese, 541.

Van Horn v. Bell, 19.
Crain, 349.
Van Husan v. Kanouse, 449.
Vankenren v. Corkins, 470.
Van Ness v. Bank United States, 258.
Hyatt, 370.
Pacard, 297.
Vannerson v. Culbertson, 571.
Vannice v. Bergen, 493.
Van Nostrand v. Moore, 571.
Van Reynegan v. Revalk, 183.
Van Riswick v. Goodhue, 425.
Van Rensslaer v. Clark, 288.
Hays, 23, 339.
Kearney, 73.
Penniman, 387.
Secor, 213.
Smith, 173.
Vickery, 65, 204.
Vansant v. Allmow, 471.
Van Schaick v. Third Ave. R. R., 376.
Van Slyke v. Shelden, 511.
Van Vechten v. Keater, 548.
Van Wagner v. Van Nostrand, 165, 167.
Van Wagner, 443.
Van Wyck v. Brasher, 30.
Seward, 37,
Varick v. Briggs, 89.
Jackson, 533.
Varrell v. Wendell, 575.
Vassar v. Vassar, 9, 415.
Vassault v. Edwards, 6.
Vasey v. Trustees, 183.
Vason v. Ball, 409.
Vaughan v. Burtford, 541.
Greer, 278, 286.
Vaughn v. Stuzaker, 165.
Tracy, 280.
Verdier v. Verdier, 542.
Verger v. Giboney, 491.
Vermont Mining Co. v. Windham Bank, 200.
Vernon v. Smith, 348, 462.
Verplank v. Sterry, 37, 76, 220.
Vertner v. Humphreys, 37.
Very v. Watkins, 500.
Vickers v. Sisson, 8.
Vickery v. Dickson, 449.
Vidal v. Gerard's Ex., 34.
Videau v. Griffin, 230, 245.
Viele v. Troy & Boston R. R. Co., 9.
Vielie v. Osgood, 15.
Villa v. Rodriguez, 416.
Villard v. Robert, 271.
Viney v. Abbott, 77.
Vinson v. Platt, 449.
Vinton v. King, 443.
Violett v. Patton, 4.
Viser v. Rice, 21.
Voorhies v. Presbyterian Church, 32.
Voorhies, 25.
Vose v. Bradstreet, 87.
Voss v. Ellar, 416.
Vredenburgh v. Burnet, 472.
Vreeland v. Claflin, 273, 287.
Vrooman v. Turner, 466.

W.

Waddens v. Humphreys, 36.
Wade v. Deray, 97.
Halligan, 173, 344.
Howard, 49.
Lindsey, 21.
Newburn, 367.
Wadsworth v. Sherman, 26.
Williams, 36, 487.
Wagner v. Stone, 409.
Wagonbeast v. Whitney, 9.
Wager, 111.
Wain v. Warlters, 4.
Wainanan v. Hampton, 8.
Wait v. Maxwell, 26, 311.
Waite v. Dennison, 514.
Wakefield v. Brown, 67, 70.
Walcop v. McKinney, 408.
Waldo v. Hall, 349.
Russell, 287.
Wales v. Mellon, 453.
Sherwood, 466.
Walkenhorst v. Lewis, 415.
Walker v. Arnold, 511.
Boynton, 108.
Cockey, 452, 509.
Deaver, 167, 176.
Dement, 472.
Gilbert, 271.
Hall, 551.
Keile, 180, 195.
King, 408, 411.
Lincoln, 59.
Paine, 444.
Physick, 346.
Reeves, 370.
Renfro, 206.
Richardson, 386.
Schreiber, 471.
Tiffin Mining Co., 414.
Walker, 77, 205.
Whittemore, 358.
Wall v. Hinds, 375.
Wall, 55, 60, 205.
Wallace v. Blair, 573.
Craps, 281.
Harmstad, 18, 20.
Harris, 77, 211, 226.
Hornlested, 23.
Hussey, 496.
Craig, 27.
Lent, 344.
Lewis, 25.
McCullough, 190, 366.
Moody, 284.
Talbot, 177.
Walle v. Arnold, 512.
Waller v. Thomas, 373.
Walling v. Aiken, 415.
Wallis v. Wallis, 55, 76, 78, 116.
Walsh v. Ætna Life Ins. Co., 443.
Hill, 101.
Walter v. Weaver, 260.
Walter's Will, 510.
Walters v. Breden, 113.
Cody, 508.
Walton v. Burton, 212, 375.
Dody, 502.
Meeks, 9.
Walton, 550.
Wanmaker v. Van Buskirk, 486.
Wannall v. Keen, 264.
Waples v. Jones, 445, 449.
Ward's Will, 551.
Ward v. Amory, 571.
Armstrong, 146.
Dougherty, 204.
Fuller, 251.
Lewis, 213.
Stow, 576.
Stuart, 8.
Ward, 205.
Warden y. Adams, 469, 470, 471.
Wardwell v. McDowell, 153.
Ware v. Egmount, 74.
Johnson, 106.
Richardson, 115.
Weathnall, 177.
Wisner, 560.
Waring v. Ayres, 4.

Warlng v. Loder, 452.
Smyth, 18.
Wark v. Willard, 249, 251.
Warn v. Brown, 85, 113.
Warner v. Blakeman, 485.
Gouverneur, 472.
Hitchins, 362.
Warner, 519, 553.
Willard, 582.
Warnock v. Campbell, 30.
Warren v. Baxter, 542.
Homestead, 470.
Jacksonville, 212.
Lovis, 414.
Lynch, 180, 194, 195.
Swett, 205.
Tobey, 221.
Wagner, 362.
Washburn v. Alden, 236.
Fletcher, 4.
Gardner, 32.
Goodwin, 500.
Merrill, 416.
Washington v. Bassett, 512.
Wasson v. Connor, 256.
Waterbury v. Sturtevant, 36.
Waterman v. Curtis, 480.
Dutton, 9.
Johnson, 105.
Meigs, 6.
Silberberg, 36.
Waters v. Waters, 491.
Watkins v. Dean, 520.
Edwards, 280.
Gregory, 414.
Watrons v. Blair, 280.
Watson v. Clendenin, 260, 261.
Dickens, 443.
Dundee Mortgage Co., 470, 473.
Gregg, 73.
Hopkins, 236.
Hunkins, 370.
Jones, 101.
Mercer, 265.
Peters, 104.
Riskamire, 32.
Therber, 27.
Sherman, 230, 514.
Watson, 55.
Wells, 282.
Watters v. Bredin, 95.
Watts v. Coffin, 353.
Pub. Admr., 541.
Waugh v. Riley, 473.
Way v. Arnold, 24.
Lyon, 284.
Reed, 339, 346.
Weaver v. Wilson, 496.
Webb v. Chisolm, 9.
Den, 69.
Flanders, 470.
Fleming, 542.
Hoselton, 424.
Jones, 551.
Meloy, 473.
Mullins, 10, 82.
Patterson, 415.
Russell, 318.
Webber v. Curtis, 512.
Webster v. Cambell, 182.
Conley, 84.
Hall, 249.
Zielly, 6.
Weed v. Covill, 443.
Davis, 37.
Weed Sewing Machine Co. v. Emerson, 464, 465.
Weeden v. Hawes, 443.
Weeks v. Eaton, 471.
Welde v. Gehl, 415, 419.
Well v. Fischer, 472.
Weile v. United States, 242.
Weill v. Lucerne Mining Co., 85.
Weintine v. Harrison, 353.
Weir v. Mosher, 490, 493.
Smith, 155.
Welsiger v. Chisholm, 36.
Welsser v. Maitland, 15.
Welborn v. Weaver, 212.
Welch v. Adams, 407, 542.
Foster, 269.
Goodwin, 471.
Phillips, 407, 411.
Priest, 470.
Sullivan, 260.
Usher, 426.
Welch, 25.
Welck v. Dutton, 59.
Weld v. Madden, 280.
Welder v. Hunt, 101.
Welland Canal Co. v. Hathaway, 309.
Wellborn v. Rogers, 25.
Wells v. Atkinson, 260.
Morrow, 279, 417.
Wells, 515, 550.
Welsch v. Belleville Savings Bank, 571.
Welsh v. Foster, 56, 116.
Kibler, 170.
Phillips, 470.
Welsh, 36.
West's Appeal, 493.
West v. Bundy, 8.
Chamberlin, 485.
Hart, 362.
Hendrix, 417.
Reed, 74, 491.
Shaw, 101.
Stewart, 165, 170.
West Branch Bank v. Chester, 445.
West Point Iron Co. v. Reymert, 119.
Westerman v. Foster, 271.
Western Mining Co. v. Peytona Coal Co., 171.
Western R. R. Co. v. Babcock, 219.
Western Transit Co. v. Lansing, 322.
Western U. Telegraph Co. v. C. & P. R. R. Co., 6, 7.
Westervelt v. Ackley, 312.
Westfall v. Lee, 181.
Westgate v. Handlin, 513.
Weston v. Foster, 576.
Westrope v. Chambers, 165.
Wetmore v. Laird, 260, 261.
Wetter v. Walker, 571.
Whalley v. Small, 291.
Wharton v. Brick, 95.
Silliman, 575.
Stoutenbargh, 8.
Wheaton v. Pike, 449.
Wheelden v. Wilson, 36.
Wheeler v. Dunlap, 580.
Earle, 382.
Hatch, 165.
Nevins, 230.
Schad, 162.
Single, 204.
Spinola, 105.
Wheeler, 551.
Wheelock v. Thayer, 165.
Warschauer, 389.
Wheelwright v. Wheelwright, 211.
Whelan v. Whelan, 76.
Whipple v. Barnes, 497.
Whitaker v. Bond, 9.
Brown, 109, 118.
Garnett, 73.
Hawley, 357.
Miller, 67.
Whitbeck v. Cook, 165.

Whitbeck v. Whitbeck, 4.
Whitcher v. Webb, 445.
White v. Bond, 370.
Brokaw, 171.
Brown, 152.
Casten, 549.
Core, 4, 206.
Davidson, 234.
Douglas, 146.
Fitzgerald, 146.
Foster, 277.
Fuller, 24, 323.
Godfrey, 104.
Hampton, 158.
Hicks, 155.
Holman, 502.
Holly, 9.
Howard, 532.
Lucas, 415.
Lnning, 101.
McGannon, 9.
McPheeters, 36.
Montgomery, 344, 353.
Palmer, 26, 311.
Patten, 169.
Rittenmyer, 401, 409.
Schuyler, 9.
Wager, 32.
Watkins, 4, 458.
Weeks, 78.
Whitney, 162, 170, 491, 407.
Whitehead v. Arline, 33.
Foley, 271.
Hellen, 514.
Wilson, 585.
Whitemore v. Gibbs, 471.
Whiting v. Dewey, 175.
Nicholl, 557.
Whitley v. Davis, 180, 195.
Whitlock v. Duffield, 354.
Whitman Mining Co. v. Baker, 33.
Whitmars v. Cutting, 297.
Whitney v. Allaire, 344.
Buckman, 438.
Dinsmore, 166.
Dutch, 25.
French, 414.
Myers, 386.
Smith, 103.
Whitney, 535.
Whitsett v. Kedshaw, 416.
Whittelsey v. Hughs, 458, 510.
Whittington v. Clark, 180.
Wright, 278.
Whittle v. Webster, 344.
Whitton v. Whitton, 31, 48, 496.
Whyler v. Van Tiger, 31.
Wickersham v. Chicago Zinc Co., 271.
Reeves, 473.
Wickes v. Caulk, 19, 257.
Wicks v. Hateh, 236.
Wigain v. Peters, 380.
Wiggins v. Lusk, 207.
Wight v. Geer, 39.
Wilter v. Est. Warren, 78, 465.
Wilbridge v. Case, 48.
Wilburn v. Spofford, 153.
Wilcox v. Bates, 416.
Howland, 28.
Morgan, 37.
Wood, 380.
Wilcoxen v. Clark, 83.
Osborn, 250.
Wilcoxson v. Miller, 287.
Wild v. Stephens, 497.
Wilder v. Brooks, 32.
Haughey, 502.
Houghton, 407.
Whittemore, 496.
Wiley v. Bean, 260.
Wiley v. Bradley, 8.
Ewalt, 30.
Ewing, 478.
Sirdorus, 118.
Wilhelm v. Mertz, 364.
Wilkerson v. Allen, 515.
Wilkes v. Bock, 246.
Wilkins v. French, 407, 411.
Gordon, 508.
Wilkinson v. Bulst, 585.
Clanson, 344.
Flowers, 497.
Getty, 157, 246.
Scott, 79.
Willard v. Benton, 336.
Clark, 18.
Cramer, 257.
Dow, 27.
Harvey, 483, 487.
Reas, 427.
Tillman, 370.
Willet v. Overton, 289.
Willington v. Gale, 315, 407,
Willis v. Astor, 354.
Long, 491.
Shorral, 158.
Willison v. Watkins, 388.
Williams v. Baker, 263.
Beard, 401.
Birbeck, 471.
Bosanquet, 370.
Burrell, 84, 161.
Davis, 37.
Downing, 46, 297.
Fitzhugh, 443.
Greer, 196.
Howard, 9.
Love, 472.
Moraney, 472.
Morris, 8.
Otey, 153.
Reynolds, 449.
Roberts, 427.
Robinson, 559.
Robson, 182.
Russell, 502.
Sprigg, 220.
Starr, 183, 195.
Stratton, 426.
Swetland, 183.
Thurlow, 465.
Townsend, 451.
Waters, 5.
Wetherbee, 168.
Williams, 145, 549.
Young, 125.
Williamson v. Brown, 281, 282.
Cavetor, 270.
Doe, 501.
Hall, 107, 167, 176.
New Jersey Southern R.
R. Co., 438.
Wackenhelm, 36.
Williamson, 571, 575.
Willingham v. Hardin, 285.
Wilmer v. Farris, 8.
Wilmerding v. Mitchell, 415.
Wilsey v. Dennis, 209.
Wilson v. Albert, 59.
Beddard, 541.
Branch, 25, 27.
Cochran, 107, 164, 168.
Drummite, 415.
Eifler, 39.
Forbes, 165.
Galt, 126.
Geisler, 502.
Gerhardt, 337, 375.
Giddings, 415.
Hildreth, 101.

Wilson v. Hunter, 93, 281.
Irish, 56.
James, 388
Knuball, 471.
Kohlhelan, 37.
Lester, 387.
Lyon, 126.
Maryland Life Ins. Co., 151.
McCullough, 281.
Mitchell, 527.
Patrick, 416.
Russell, 76.
Simpson, 241.
Trayer, 256
Troup, 236, 423, 470, 471, 510.
Wildenham, 165.
Wilson, 176, 586.
Wilt v. Franklin, 209, 214.
Wilton v. Harwood, 2, 8.
Winans v. Peebles, 32, 76, 78.
Windsor v. China, 380.
Wing v. Cooper, 395, 458.
Goodman, 427.
Hall, 275.
Hayden, 181.
McDowell, 9.
Wingate v. Dall, 2.
Winkler v. Higgins, 262.
Winnipiscogee v. Perley, 92.
Winslow v. Patten, 89.
Winslow, 67.
Winstead v. Bingham, 171.
Winstead Savings Bank v. Spencer, 201.
Winston v. Vaughn, 173.
Winters v. Cornish, 357.
Winter's Appeal, 576.
Winthrop v. Fairbanks, 118, 119.
Winton's Appeal, 476.
Winton v. Cornish, 389.
Wise v. Metcalfe, 345.
Moore, 37.
Postlewait, 259.
Witczinski v. Everman, 444.
Withers v. Atkinson, 20.
Baird, 256.
Buckley, 105.
Withy v. Mumford, 162.
Witter v. Biscoe, 181, 182.
McNeil, 31.
Mott, 549, 553.
Witty v. Matthews, 344, 353, 357
Wofford v. Board Police of Holmes Co., 508.
McKinna, 87, 88.
Wolbert v. Lucas, 465.
Wolcott v. Sullivan, 470.
Wolf v. Bollinger, 549.
Fogarty, 260.
Mitchell, 364.
Smith, 492.
Wolfe v. Arrott, 357.
Dowell, 485.
Womack v. Womack, 25.
Wood v. Augustine, 497.
Bach, 256.
Beach, 56.
Chambers, 36.
Chapin, 56, 288.
Clark, 36.
Cochrane, 259.
Davis, 4.
Franks, 36.
Goodfellow, 497.
Goodridge, 245, 246, 366.
Hilderbrand, 20.
Hunt, 37.
Jones, 8.
Lord, 183.
Morlarty, 79.
Partridge, 373, 389.
Wood v. Sands, 472.
Sawin, 4.
Smith, 187.
Thomas, 472.
Trask 109.
Wheeler, 138.
Wood, 535.
Woodbourne v. Gorrel, 249, 260.
Woodbury v. Aikin, 491.
Fisher, 207.
Gardner, 8.
Swan, 464.
Woodcock v. Estey, 119.
Woodford v. Stephens, 33.
Woodhead v. Foulds, 263.
Woodhull v. Rosenthall, 369.
Woodliff v. Drury, 134.
Woodruff v. Cook, 585
Migeon, 571.
McHarry, 256.
W. P. Co., 126.
Woods v. Hilderbrand, 20, 401, 408.
Naumkeag S. C. Co., 353.
Pindall, 30.
Shields, 502.
Woods, 502.
Woodsworth v. Tanner, 32.
Woodward v. Barr, 272.
Davis, 473.
Woodworth v. Guzman, 417.
Morris, 429.
Wooddridge v. Hancock, 8.
Woody v. Dean, 37.
Wooley v. Constant, 18, 21
Holt, 409.
Naylor, 512.
Woolery v. Woolery, 550.
Woonsocket Sav. Inst. v. Amer. Woorsted Co., 511.
Worcester v. Eaton, 25, 28.
Workman v. Dominick, 542.
Wormley v. Wormley, 284,
Worrall v. Munn, 6, 7, 224.
Worthington v. Cooke, 577.
Worthy v. Brady, 36.
Worthington v. Keenan, 540.
Wragg v. Compt. Gen., 427.
Wren v. Buckley, 409.
Wright v. Bates, 415, 416.
Bundy, 265.
Burrows, 339.
Douglas, 309.
Eaves, 449, 497.
Germain, 25.
Henderson, 409.
Howell, 36.
Langley, 443.
Mischo, 4.
Pucket, 8.
Shumway, 425.
Smyth, 174.
Whithead, 477.
Wright, 18, 173, 549.
Wright's Appeal, 571.
Wuesthoff v. Seymour, 108.
Wyche v. Greene, 89.
Wyman v. Ballard, 166.
Brown, 56, 270.
Symmes, 542.
Wynne v. Governor, 18.

Y.

Yale v. Flanders, 196.
Yarborough v. Monday, 196.
Yarbrough v. Newell, 115.
Yard v. Yard, 29.
Yaryan v. Shriner, 427.

Yates v. Cole, 574.
Yates, 415.
Yerby v. Grigsby, 246.
Yoe v. McCord, 541.
York v. Merritt, 36.
Young v. Barrett, 542.
Clippinger, 59.
Guilbeau, 209.
Marshall, 85,
Miller, 470, 471.
Ring, 76.
Wheeler, 31.
White, 37.
Wood, 427.
Youngblood v. Vastine, 284, 286.
Younge v. Guilbeau, 214.
Younger v. Duffie, 541.
Youngman v. Elmira, etc. R. R. Co., 411, 508.
Youngs v. Wilson, 442.
Youse v. Norcoms, 27.

Z.

Zane v. Kennedy, 154.
Zekind v. Newkirk, 415.
Zoller v. Ide, 191.
Zouch v. Parsons, 25, 319.

LAW OF CONVEYANCING.

Purchase Deeds—Leases—Mortgages—Wills.

TITLE I.—Purchase Deeds.

Chapter I. General Requisites of Deeds.
II. The Formal Parts of a Deed.
III. Of the Execution of Deeds.
IV. Acknowledgment and Registration.

CHAPTER I.—General Requisites of Deeds.

Article I. Contracts for the Purchase and Sale of Land.
II. Deeds May be of What Material.
III. Must be Completely Written Before Delivery.
IV. Of the Parties to a Deed.
V. Fraudulent Conveyances.

ARTICLE I.

CONTRACTS FOR THE PURCHASE AND SALE OF LAND.

SECTION.
1. Every deed is founded upon a pre-existing purpose.
2. Statutory requisites for a contract of sale.
3. Statute applies to every interest in land.

4. What must be contained in the agreement.
5. Parol evidence, when admissible.
6. As to the signature.
7. Signature by agent.
8. The equitable doctrine of part performance.
9. The effect of the contract, and herein of specific performance.
10. Whether a deed, or an agreement for a deed.

§ 1. **Every Deed is the Carrying out of Some Pre-existing Intention** of the parties thereto, and it is to be remarked that this intention forms an important part of the transaction. Indeed, it may be stated that the agreement or consent of the parties is the first essential to the operation of a deed as a conveyance. It is, therefore, thought proper to preface the consideration of purchase deeds with a few remarks concerning the contracts upon which they are ordinarily founded, though it would be inconsistent with the design of the present work to enter into an extended discussion of mere executory contracts. The questions under this head are very numerous, and it is not possible to comprehend them all in a few general propositions, but our effort will be to present in as brief a space as possible a primary view of the essential elements of such agreements.

§ 2. **The Principal Statutory Requisites to the Contract** are to be found in the fourth section of the Statute of Frauds. This statute was passed in the reign of Charles II., A. D. 1677, for the purpose of preventing frauds and perjuries by requiring in many cases written evidence of a contract. Similar statutes have been enacted or declared in force in all of our States, and although no two of them agree exactly in all their provisions they are substantially the same. This statute,[1] among other things, provides that no action shall be brought to charge any person upon any contract or sale of lands,[2] tenements or hereditaments, or

[1] 29 Car. II, ch. 3, § 4.

[2] In California, Connecticut and Idaho, the statute reads: "Upon any sale," etc., "of real estate." In Texas, the words "or any interest in or concerning real estate," are omitted. See Evans v. Hardeman, 15 Tex. 480; Anderson v. Powers, 59 *Ibid.* 213.

any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[1]

§ 3. **To what Interest in Land the Statute Applies.**— Some of the States, by positive enactment, undertake to define the meaning of the term "real estate," or "lands, tenements and hereditaments," as used in the statute.[2]

[1] Alabama, Code 1876, § 2121: Arizona, Comp. Laws 1877, §§ 2125, 2132; Arkansas, Mansf. Dig. 1884, § 3371; California, Hitt. Code 1876, § 6624; Colorado, Gen Stat. 1883, §§ 1521, 1525; Connecticut, Rev. 1875, tit. 19, ch. 11, § 40; Dakota, Civ. Code, § 920; Delaware, Rev. Code 1874, ch. 63, §§ 6, 7; Florida, Dig. 1881, ch. 29, § 1; Georgia, Code 1882, § 1950, or guardian or trustee; Idaho, Gen. Laws 1881, Civ. Code, § 937; Prob. C. 215; Illinois, Cothran's Stat. 1883, ch. 59, § 1; Indiana, Rev. Stat. 1881, § 4904; Iowa, Miller's Rev. Code 1880, §§ 3663–4. In Iowa, the statute relates merely to the proof, and does not prevent the party from establishing the contract by evidence of the other party, § 3667. If not denied in the pleadings it will be enforced, § 3666: Kansas, Comp. Laws 1879 (Dessler), ch. 43, § 6: Kentucky, Gen. Stat. 1881, ch. 22, § 1: Maine, Rev. Stat. 1883, ch. 111, § 1: Massachusetts, Pub. Stat. 1882, ch. 78, § 1; Michigan, How. An. Stat. 1882, § 6185: Minnesota, Gen. Stat. 1878, ch. 41, § 6; Mississippi, Code 1880, § 1292; Missouri, Rev. Stat. 1879, § 2513; Montana, Rev. Stat. 1879, § 247; Nebraska, Comp. Stat. 1881, pt. 1, ch. 32, §§ 8, 25; Nevada, Comp. Laws 1873, §§ 289, 296; New Hampshire, Gen. Laws 1878, ch. 220, §§ 14, 15; New Jersey, Rev. Stat. 1877, ch. Frauds, § 5; New York, Rev. Stat. (Banks Bros. 7th ed.), pt. 2, ch. 7, tit. 2, §§ 2-4; North Carolina, Code 1883, §§ 1506, 1552, 1554; Ohio, Rev. Stat. 1880, § 4199: Oregon, Civ. Code, § 775; Pennsylvania, Bright. Pur. Dig. 1872, Frauds, § 4; Rhode Island, Pub. Stat. 1882, ch. 204, § 7; South Carolina, Gen. Stat. 1882, § 2019; Tennessee, Code 1884 (Mill. & Vert.), § 2423; Texas, Rev. Stat. 1879, § 2464; Utah, Comp. Laws 1876, §§ 1014, 1019; Civ. Code, § 1208; Vermont, Rev. Laws 1880, § 981; Virginia, Code 1873, ch. 140, § 1; Washington Ter., Code 1881, § 2325; West Virginia, Kelly's Rev. Stat. 1878, ch. 95, § 1; Wisconsin, Rev. Stat. 1878, §§ 2307, 2327; Wyoming, Comp. Laws 1876, ch. 57, § 1.

[2] Alabama, Code 1876, § 2; Arizona, Comp. Laws 1877, § 2279; Arkansas, Mansf. Dig. 1884, §§ 645, 6347; California, Hitt. Code 1876, § 5014; Dakota, Civ. Code, § 2126; Delaware, Rev. Code 1874, ch. 5, § 1; Illinois, Cothran's Stat. 1883, ch. 30, § 38; Indiana, Rev. Stat. 1881, § 1285; Missouri, Rev. Stat. 1879, §§ 700, 3126; Nebraska, Comp. Stat. 1881, pt. 1, ch. 73, § 44; New Mexico, Comp. Laws, 1884, C. L. 1880, ch. 44, § 2; North Carolina, Code 1883, § 3765; South Carolina, Gen. Stat. 1882, § 444.

Questions have frequently arisen as to what is included, under the term "interest in or concerning" lands, and the cases are not all reconcilable in this particular.[1] But the true distinction is, that if any legal or equitable ownership, however slight, in anything, which either at common law or equity is deemed real estate, is the subject of contract or intended to pass by it, the Statute of Frauds requires it

[1] A parol contract to sell and deliver whatever broom-corn should be raised on twenty-five acres of land is within the Statute of Frauds. Bowman v. Conn, 8 Ind. 58. But see Scott v. White, 71 Ill. 288. Contract to sell wild grass growing on wild, uncultivated land is within the statute. Powers v. Clarkson, 17 Kan. 218. Contract between landlord and tenant for a lien on the crop is not within the statute. Gafford v. Stearns, 51 Ala. 434. But see Kerr v. Hill, 27 W. Va. 576. Contract for sale of growing trees is within the statute. Owens v. Lewis, 46 Ind. 489; Cool v. Peters, 87 Ind. 532; Lillie v. Dunbar, 62 Wis. 198; Hawkins v. Harmen (Wis.), 35 N. W. Rep. 28; Eliot v. Barrett (Mass.), 10 N. E. Rep. 820; Pattison's Appeal, 61 Pa. St. 294; Daniels v. Bailey, 43 Wis. 566. Agreement to build a dam on land not within the statute. Jackson v. Litch, 62 Pa. St. 451. Those possessory rights in realty known in California as "squatters' rights," were interests in land under the statute. Hayes v. Skidmore, 27 Ohio St. 331. An agreement to open a channel on land and divert water into the same, is not within the statute. Hamilton Hydraulic Co. v. C., H. & D. R. Co., 29 Ohio St. 341. Contract to erect a division fence not within the statute. Talmadge v. R. & S. R. Co., 13 Barb. 493. Agreement to cut standing trees into cord-wood and deliver the wood, is not within the statute. Killmore v. Howlett, 48 N. Y. 569. Contract to sell one-sixteenth of the oil to be produced by an oil-well is an interest in land within the statute. Henry v. Colby, 3 Brewster (Pa.), 171. See also on this subject School District v. Milligan, Supreme Court of Pennsylvania, 8 Cent. L. J. 425; Snyder v. Walford, 33 Minn. 175; Bland v. Talley (Ark.), 6 S. W. Rep. 234; Davis v. Gerber (Mich.), 37 N. W. Rep. 281; Turner v. Johnson (Mo.), 7 S. W. Rep. 570; Gardner v. Randall (Tex.), 7 S. W. Rep. 781. Agreement for the exchange of land for land is within the statute. Rice v. Peet, 15 Johns. 503. Contract for standing timber on tract of land is an interest in land. Bowers v. Bowers, 95 Pa. St. 477. Verbal promise to compensate a party by will, either in land or money, is within the statute. Howard v. Browner, 37 Ohio St. 402. An interest in contingent profits, arising from sale of real estate, is not an interest in land. Benjamin v. Zell, 100 Pa. St. 33. Agreement to let a hall not within statute. Johnson v. Wilkinson, 139 Mass. 3. Contract for sale and delivery of house then annexed to land not within statute. Long v. White, 42 Ohio St. 59; Rogers v. Cox, 96 Ind. 157. An easement is within the statute. Robinson v. Thrailkill, 110 Ind. 117.

to be in writing;[1] while on the other hand, a license or agreement to do anything on, with or about the realty, need not be in writing, where no interest is to pass to the party.[2]

§ 4. **What Must be Contained in the Agreement.**— Since the agreement is to be in writing, it follows that the writing must contain within itself the means of ascertaining the essential parts of the contract.[3] This, ordinarily, includes the names of the contracting parties, the consideration, a description of the property, and the stipulations intended to bind the parties.[4] It has been held that the memorandum of a sheriff, acting as trustee, or an auctioneer, setting forth the description, terms of sale, etc., is sufficient under the statute.[5] And the weight of authority

[1] Holmes v. Holmes, 86 N. C. 205; Cloud v. Greasley (Ill.), 17 N. E. Rep. 826.

[2] McConnell v. Brayner, 63 Mo. 461; Bishop on Contracts, 1887, § 1292, and cases cited. Michael v. Foil (N. C.), 6 S. E. Rep. 264; Moritz v. Savalle (Cal.), 18 Pac. Rep. 803.

[3] Verbal testimony is not admissible to supply any defect in the written evidence as to the essential terms of a sale. Parkhurst v. Van Cortlandt, 1 Johns. Ch. 281; 2 Wharton on Evidence, § 921; Nichols v. Johnson, 10 Conn. 192; Abeel v. Radcliff, 13 Johns. 297; Carter v. Shorter, 57 Ala. 253; Cox v. Cox, 59 Ala. 591; Neufville v. Stewart, 1 Hill (S. C.), 166; Cossitt v. Hobbs, 56 Ill. 232; Wood v. Davis, 83 Ill. 311; Rafferty v. Longee, 63 N. H. 54. Description of the property must not be indefinite. Fry v. Platt, 32 Kan. 62; Francis v. Barry (Mich.), 37 N. W. Rep. 353. A memorandum not clearly showing which party was vendor and which vendee, not sufficient under Code Mississippi, § 1295. Frank v. Eltringham (Miss.), 3 Smith, 655. As to what is required in Minnesota, see Clampet v. Bells, 39 N. W. Rep. 495.

[4] Johnston v. Jones (Ala.), 4 South. Rep. 748. In Colorado, the memorandum must show names of the parties, terms and conditions of the contract, interest or property affected, and the consideration. Eppich v. Clifford, 6 Colo. 493. Under the Statute of Virginia, the promise only need be in writing. Violett v. Patton, 5 Cranch, 142. Signing receipt for money paid is not sufficient memorandum. Wright v. Mische, 52 N. Y. Sup. Ct. 241.

[5] Smith v. Arnold, 5 Mason (R. I.), 419; White v. Watkins, 23 Mo. 427; Buckmaster v. Harrop, 13 Ves. 464; Adams v. Scales, 57 Tenn. 337; Barclay v. Bates, 2 Mo. App. 139; Springer v. Klenisorge, 83 Mo. 152. But *contra*, Gwathney v. Cason, 74 N. C. 5; Rafferty v. Longee, 63 N. H. 54. It is manifest, however, that this rule would not hold good where the statute requires the authority of the agent shall be in writing. *Infra*, § 7. Broker's memorandum not sufficient if terms of sale are omitted. Eliot v. Barrett, 144 Mass. 256. Memorandum signed by

seems to be in favor of such a rule, provided the memorandum made by the auctioneer is made within a reasonable time after the hammer falls.[1]

Whether it is necessary that the consideration should be expressed in the writing as part of the agreement, is a question which has been much discussed, and upon which some of the cases are in direct opposition, owing, to some extent, to a variation in the terms of the statute.[2] In a few of the States it is provided by statute that the consideration need not be expressed in such note or memorandum, but may be proved by legal evidence.[3] In others, however, it is required by statute, that the consideration be expressed in the writing.[4] If, however, a conveyance

auctioneer which fails to show who the owner or vendor was, not sufficient. O'Sullivan v. Overton (Conn.), 14 Atl. Rep. 300.

[1] Smith v. Arnold, 5 Mason (R. I.), 419; White v. Watkins, 23 Mo. 423; Jelks v. Barrett, 52 Miss. 316; *Infra*, § 7. The memorandum of the auctioneer must be *contemporaneous* with the sale. Bamber v. Savage, 52 Wis. 110.

[2] Lord Ellenborough, in Wain v. Warlters, 5 East, 10, held that, under the English statute, the consideration is a part of the agreement and must be expressed in the writing, and this has ever since been held to be the English rule. Saunders v. Wakefield, 4 B. & Ald. 595; Sears v. Brink, 3 Johns. 210; Leonard v. Vredenburgh, 8 Johns. 29; Neelson v. Sanborn, 2 N. H. 413; Phelps v. Stillings, 60 N. H. 505. *Contra:* Packard v. Richardson, 17 Mass. 122; Levy v. Merrill, 4 Greenl. 180; Miller v. Irvine, 1 Dev. & Bat. 103; Sage v. Wilcox, 6 Conn. 81; Buckley v. Beardslee, 5 N. J. L. 570; Thomas v. Hammond, 47 Tex. 42; Washburn v. Fletcher, 42 Wis. 152; Steadman v. Guthrie, 4 Metc. (Ky.) 147; Shively v. Black, 45 Pa. St. 345; Bean v. Valle, 2 Mo. 126; Cummings v. Dennett, 26 Me. 397; Bowser v. Cravener, 56 Pa. St. 132; Thornberg v. Masten, 88 N. C. 293. In Alabama, consideration must appear in memorandum. Phillips v. Adams, 70 Ala. 373. In Illinois, it was held that the provision of the Statute of Frauds of 1869, for the sale of land, requires the consideration as well as the promise itself to appear in writing. Under the revision of 1874 the rule is different. Patmor v. Haggard, 78 Ill. 607; Ludeke v. Sutherland, 87 Ill. 482.

[3] Mass. Pub. Stat. 1882, ch. 78, § 2; Me. Rev. Stat. 1883, ch. 111, § 1; N. J. Rev. Stat. 1877, ch. Frauds, § 9; Ind. Rev. Stat. 1881, § 4905; Ill. Cothran's Stat. 1883, ch. 59, § 3; Mich. Stat. 1882, §§ 6182, 6189; Neb. Comp. Stat. 1881, pt. 1, ch. 32, § 24; Va. Code 1873, ch. 140, § 1; Ky. Gen. Stat. 1881, ch. 22, § 1.

[4] Minn. Gen. Stat. 1878, ch. 41, § 6; Oreg. Gen. Laws Civ. Code, § 775; Nev. Comp. Laws 1873, §§ 289, 296; Ala. Code 1876, § 2121.

bargained for is actually made, any oral promise regarding the consideration, as to pay for the land, is universally held good.[1]

The written agreement need not be contained in a single document. It may consist of several documents or letters relating to the same contract, but it must appear that they are thus connected.[2] It is hardly necessary to add that no particular form is required.[3] It is sufficient if the contract can be ascertained with certainty from the writings.[4] Thus a description of the property, if intelligible to those who know it, such as "my farm," or "this place," is sufficient.[5] Parol evidence is admissible to show what property answers the description.[6]

[1] Nutting v. Dickinson, 8 Allen, 640; Basford v. Pearson, 9 Allen, 387; Mason v. Mason, 3 Bush, 35; Whitbeck v. Whitbeck, 9 Cow. 266; Nickerson v. Saunders, 36 Me. 413; Price v. Sturgis, 44 Cal. 591; Atchison, etc. R. Co. v. English (Kan.), 16 Pac. Rep. 82. A vendee who refuses to fulfill a contract for the purchase of land which is within the Statute of Frauds because not in writing, cannot recover money paid on the contract from the vendor who is willing and offers to perform. McKinney v. Harvie (Minn.), 35 N. W. Rep. 668.

[2] Ide v. Stanton, 15 Vt. 686; Jackson v. Lowe, 1 Bing. 9; Dobell v. Hutchinson, 3 A. & E. 355; 1 Greenl. on Ev., § 268; Foster v. Leeper, 29 Ga. 297; Toomer v. Dawson, 1 Cheves (S. C.), 68; Long v. Millar, Eng. Ct. of App., 27 W. R. 720; Roehl v. Haumesser (Ind.), 15 N. E. Rep. 345; Tice v. Freeman, 30 Minn. 389; Peck v. Vandemark, 99 N. Y. 29; Lee v. Cherry, 85 Tenn. 707. The letters need not be addressed by one of the contracting parties to the other. Hollis v. Burgess, 37 Kan. 487.

[3] McConnell v. Brillhart, 17 Ill. 354; Wood v. Davis, 82 Ill. 311; Cadwalader v. App., 81 Pa. St. 194.

[4] Parol evidence is admissible to connect the various parts of the contract. Lee v. Mahoney, 9 Iowa, 344; Fulton v. Robinson, 55 Tex. 401.

[5] Madden v. Tucker, 46 Me. 367; Wood v. Sawin, 4 Gray, 322; Dinsmore v. Winegar, 57 N. H. 382; Hilliard v. Phillips, 81 N. C. 105; Brown v. Coble, 76 N. C. 391; McCornack v. Sage, 87 Ill. 484; Reader v. Helms, 57 Ala. 440; Morrison v. Dailey (Tex.), 6 S. W. Rep. 426; Quinn v. Champagne (Minn.), 34 N. W. Rep. 451; Francis v. Barry (Mich.), 37 N. W. Rep. 353.

[6] 2 Whart. on Ev. § 943; Brinkerhoff v. Olp, 35 Barb. (N. Y.) 27; Waring v. Ayres, 40 N. Y. 357; Steadman v. Taylor, 77 N. C. 134; Colcord v. Alexander, 67 Ill. 584; Cornwell v. Cornwell, S. C. Ill., 9 Cent. L. J. 158; Troup v. Troup, 87 Pa. St. 149; White v. Core, 20 W. Va. 272; Lente v. Clarke (Fla.), 1 South. Rep. 149; Hollis v. Burgess, 37 Kan. 487. But *contra*, Holmes v. Albee, S. C. Iowa, 8 Cent. L. J. 447.

§ 5. **Parol Evidence, when Admissible.**—It is a familiar principle that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.[1] But in construing a contract the court places itself as near as possible in the situation of the parties, and parol evidence is admissible for that purpose.[2] It may, in such cases, be introduced to show the circumstances under which the contract was made, not for the purpose of varying, but explaining the writing.[3] But contemporaneous conversations and agreements are inadmissible for the purpose of showing the intention of the parties.[4] The duty of the court is not to ascertain what the parties may have secretly intended, but what is the meaning of the words they have used.[5] Parol evidence is also admissible to show the meaning of technical terms of art, of obscure terms, or to show a usage or custom,[6] and to show and explain latent ambiguities.[7]

[1] Boorman v. Johnston, 12 Wend. 575; Cocke v. Bailey, 42 Miss. 81; Huse v. McQuade, 52 Mo. 388; Clarke v. N. Y. Life Ins. Co., 7 Lans. 326; Kain v. Old, 2 Barn. & Cres. 627; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Dean v. Mason, 4 Conn. 428; 2 Whart. on Ev. § 920; Williams v. Waters, 36 Ga. 454.

[2] 2 Whart. on Ev. § 940; Simpson v. Margitson, 11 Q. B. 31; Guy v. Sharpe, 1 Myl. & K. 602; Lancey v. Phœnix Fire Ins. Co., 56 Me. 565.

[3] Crawford v. Jarrett, 2 Leigh (Va.), 630; Lyman v. Babcock, 40 Wis. 503; Ganson v. Madigan, 15 Wis. 144; Sawyer v. Dodge County Ins. Co., 37 Wis. 503; Knight v. New England Co., 2 Cush. 271; Foster v. McGraw, 64 Pa. St. 464; Musgat v. Pumpelly, 46 Wis. 667; Peisch v. Dickson, 1 Mason, 11; Lee v. Cherry, 85 Tenn. 707.

[4] Vanderkarr v. Thompson, 19 Mich. 82; King v. Ruckman, 21 N. J. Eq. 599; Pilmer v. Bank, 4 Am. Law Reg. (N. S.) 336. See also Swain v. Seamens, 9 Wall. 254; Doherty v. Hill, 144 Mass. 465.

[5] 1 Greenl. on Ev. § 287; Cubberly v. Cubberly, 12 N. J. L. 308; Champion v. White, 5 Cowen (N. Y.), 511; Russell v. Schurmier, 9 Minn. 28.

[6] Eaton v. Smith, 20 Pick. 150; N. J. Zinc Co. v. Boston Co., 15 N. J. Eq. 418; Lyman v. Babcock, 40 Wis. 503; Musgat v. Pumpelly, 46 Wis. 660. But see Schmeling v. Kriesel, 45 Wis. 325; Brauns v. Stearns, 1 Oreg. 367; Jenny Lind Co. v. Bower, 11 Cal. 194; Locke v. Rowell, 47 N. H. 46; Thompson v. Hamilton, 12 Pick. 425; Pilmer v. Bank, 4 Am. Law Reg. (N. S.) 336; Hartwell v. Camman, 10 N. J. Eq. 128; Barnard v. Kellogg, 10 Wall. 383; Robinson v. United States, 13 Wall. 363.

[7] Hall v. Davis, 36 N. H. 569; Cubberly v. Cubberly, 12 N. J. L. 308;

§ 6. **As to the Signature.**—It will be observed that the writing is to be "signed by the party to be charged therewith." It is not necessary that it be signed by the party insisting on the performance, or that he be bound by it.[1] This question was fully considered by Chancellor Kent in *Clason v. Bailey*,[2] and the authorities reviewed at some length; and although he agreed with Lord Chancellor REDESDALE in *Lawrenson v. Butler*,[3] that on principle the contract ought to be mutual and ought not to be enforced in equity, unless each party might have the same right, yet he felt himself bound by the authorities which were then too well settled to be disturbed. The Supreme Court of the United States has held that the memorandum, though signed by the defendant, is not sufficient to sustain an action unless the other party to the agreement is either named in the memorandum or so designated in some paper signed by the defendant that he can be identified without parol proof.[4] And this seems to be sustained by Bank of U. S. v. Dunn, 6 Pet. 51; Shuetze v. Eggers, 40 Mo. 69; Hotchkiss v. Barnes, 34 Conn. 35; Peisch v. Dickson, 1 Mason, 9; Ely v. Adams, 19 Johns. 313; Piper v. True, 36 Cal. 607; Hartwell v. Camman 10 N. J. Eq. 128. But all the attendant and surrounding circumstances may be proved, and if there is any ambiguity, latent or patent, it may be explained. California, Hitt. Code 1876, § 11860; Georgia Code 1882, § 2757; Montana, Civ. Code, § 610; Oregon, Civ. Code, §§ 682, 686. So if a part of a contract only is reduced to writing, and it is manifest that the writing was not intended to speak for the whole contract, parol evidence is admissible. Georgia, Code 1882, § 2757.

[1] Farnell v. Lowther, 18 Ill. 255; Esmay v. Gorton, 18 Ill. 483; Perkins v. Hadsell, 50 Ill. 220; Clason v. Bailey, 14 Johns. 484; McCrea v. Purmort, 16 Wend. 460; Allen v. Bennett, 3 Taunt. 170; Penniham v. Hartshorn, 13 Mass. 91; Vassault v. Edwards, 43 Cal. 458; Marqueze v. Caldwell, 48 Miss. 23; Justice v. Lang, 42 N. Y. 493; Old Colony R. R. Co. v. Evans, 6 Gray. 25; W. U. Telegraph Co. v. C. & P. R. R. Co., 86 Ill. 246; Gartnell v. Stafford, 12 Neb. 545; Carskaddon v. Kennedy, 40 N. J. Eq. 259; Love's Executors v. Welch (N. C.), 2 S. E. Rep. 242. By the words, "the party to be charged," in the statute, must be understood the defendant in the action. Newby v. Rogers, 40 Ind. 9; Cadwallader v. App., 81 Pa. St. 194; Crutchfield v. Donathon, 49 Tex. 692. But see Bingham on Sale of Real Property, p 434 *et seq.*

[2] 14 Johns. 484.

[3] Sch. & Lef. 13.

[4] Grafton v. Cummings, 8 Cent. L. J. 381.

the weight of authority, both in England and in this country,[1] though a prior decision of the Supreme Court of the United States in 1877 seems to be opposed to the doctrine.[2]

It is not material in what part of the agreement the signature is to be found, unless the document is evidently incomplete.[3] This is true, except in those of our States, in which the statute has the word "subscribed" instead of "signed," in which case the signature should be at the bottom of the instrument.[4] The note or memorandum need not be made and subscribed by the party to be charged at the time of making the agreement.[5] It seems that putting initials to a document, the name appearing elsewhere, is a sufficient signing to satisfy the requirements of the statute.[6] So a printed signature, if ordinarily used, is sufficient.[7] So if written with a lead-pencil.[8] The contract, the reader will perceive, need not be under seal.[9] But it is to be remembered that a corporation aggregate which has a common seal must use that seal as its common signature.

§ 7. **Signature by Agent.**—The statute also makes a signature by a lawfully authorized agent binding on his principal. It is not necessary in such case that the agent's authority should be in writing. If lawfully authorized verbally he can bind his principal by a valid signing of the executory contract.[10] Under the statutes of Pennsylvania,

[1] Browne on Stat. of Frauds, § 372; Champion v. Pulle, 1 Bos. & P. 252; Waterman v. Meigs, 4 Cush. 497; Sherburne v. Shaw, 1 N. H. 157.

[2] Beckwith v. Taylor, 95 U. S. 289.

[3] Cabot v. Haskins, 3 Pick. 83; Smith v. Howell, 3 Stock. 349; Brink v. Spaulding, 41 Vt. 96.

[4] Davis v. Shields, 26 Wend. 341.

[5] Webster v. Zielly, 52 Barb. (N. Y.) 482.

[6] Phillimore v. Barry, 1 Camp. 513.

[7] Saunders v. Jackson, 2 Bos. & P. 238; Schneider v. Norris, 2 M. & S. 286; Torrett v. Crupps, 9 Cent. L. J. 41; Drury v. Young, 58 Md. 546.

[8] Clason v. Bailey, 14 Johns. (N. Y.) 484.

[9] Martin v. Weyman, 26 Tex. 460; Worrell v. Munn, 5 N. Y. 229.

[10] Story on Agency, § 50; Clason v. Bailey, 14 Johns. 484; Johnson v. Dodge, 17 Ill. 433; W. U. Telegraph Co. v. C. & P. R. R. Co., 86 Ill. 246; Worrell v. Munn, 5 N. Y. 229; Champlin v. Parish, 11 Paige, 406;

California and Nebraska, however, the authority of the agent must be in writing.[1] It is to be remembered that an agent cannot, in general, delegate his authority, and, therefore, the writing must be signed by him personally; it cannot be signed by his clerk, so as to bind the principal.[2] The instrument should purport on its face to be the contract of the principal. Strictly, his name should be inserted in and signed to it. But how far this is necessary in order to bind the principal and to relieve the agent is a question that has been much discussed and upon which the decisions are not uniform. The better opinion seems to be that parol evidence may always be admitted to charge an unnamed principal, but not to discharge the actual signer.[3] This rule is only applicable to executory agreements and does not apply to sealed instruments.[4] It may be added that the auctioneer, at a sale of lands, is regarded as the agent of both parties; and if the whole contract can be made out from the memorandum and entries signed by him, his signature will bind them both.[5]

Brown v. Eaton, 21 Minn. 409; McWilliams v. Lawlers, 15 Neb. 132. But see Doherty v. Hill, 144 Mass. 465. Otherwise as to conveyances by which an interest in lands *in presenti* is intended to be conveyed, when the authority must be in writing. McWharter v. McMahan, 10 Paige, 386. But see Mutual Benefit Life Ins. Co. v. Brown, 30 N. J. Eq. 194. In Illinois, the authority of the agent signed by his principal, and also memorandum of sale signed by the agent must be in writing. Alberson v. Ashton, 102 Ill. 50. Specific performance of contract for the sale of land, made in name of authorized agent cannot be enforced by the agent. Morton v. Stone (Minn.), 39 N. W. Rep. 496.

[1] Vanhorne v. Frick, 6 S. & R. 90; McDowell v. Simpson, 3 Watts, 129; Twitchell v. City, 33 Pa. St. 220. Civil Procedure of Cal., Vol. 2, § 1973; Morgan v. Burgen, 3 Neb. 213.

[2] Pierce v. Corf, L. R. 9 Q. B. 210; Coles v. Trecothick, 9 Ves. 235; Henderson v. Barnwall, 1 You. & Jer. 387; Conaway v. Sweeny, 24 W. Va. 643. But see *Ex parte* Sutton, 2 Cox Chan. 84.

[3] Spencer v. Field, 10 Wend. 87; Pinckney v. Hagadorn, 1 Duer, 89; Morgan v. Burgen, 3 Neb. 209; Johnson v. Dodge, 17 Ill. 442; Higgins v. Senior, 8 M. & W. 834; Evans v. Wells, 22 Wend. 324. Story on Agency, § 147, note and cases cited. But see Sharp v. Emmett, 5 Whart. 288.

[4] Stackpole v. Arnold, 11 Mass. 27.

[5] *Ante*, § 4. Morton v. Dean, 13 Metc. (Mass.) 385; Pinckney v. Haga-

§ 8. **The Equitable Doctrine of Part Performance.**— In nearly all of the States[1] the rule is well settled that part performance takes a parol agreement out of the Statute of Frauds.[2] The principle of the doctrine appears to be that "if one of the contracting parties induce the other so to act, that, if the contract be abandoned, he cannot be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete it in

dorn, 1 Duer. 89; Clason v. Bailey, 14 Johns. 484. But this only applies to sales of personal property. In cases of sale of real estate the memorandum of the auctioneer must be actually subscribed by the party to be charged. Champlin v. Parish, 11 Paige, 405.

[1] Under the laws of Mississippi, Maine, North Carolina and Tennessee, a parol contract for the sale of land will not be enforced even where there has been a part performance. Fisher v. Kuhn, 54 Miss. 480; Wilton v. Harwood, 23 Me. 131; Barnes v. Brown, 71 N. C. 507; Ridley v. McNairy, 2 Humph. 174.

[2] Northrop v. Boone, 66 Ill. 368; Tilton v. Tilton, 9 N. H. 385; Wiley v. Bradley, 60 Ind. 62; Parkhurst v. Van Cortland, 14 Johns. 15; Ottenhouse v. Burleson, 11 Tex. 87; Stoddert v. Tuck, 5 Md. 18; Mayer v. Adrian, 77 N. C. 83; Williams v. Morris, 95 U. S. 444; Hobbs v. Wetherwax, 38 How. (N. Y.) Pr. 390; Bennett v. Abrams, 41 Barb. 619; Wharton v. Stoutenbargh, 35 N. J. Eq. 266; Cannon v. Collins, 3 Del. Ch. 132; Green v. Jones, 76 Me. 563; Haines v. Spanogle, 17 Neb. 637. In Georgia, the statute requiring the contract to be in writing does not apply when the contract has been fully executed; where there has been performance on the one side accepted by the other in accordance with the contract; or where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance. Code 1882, § 1951. And many of the States requiring the contract to be in writing provide that "nothing herein is to abridge the power of a court to compel specific performance of agreements partly performed." Alabama, Code 1876, § 2123; Arizona, Comp. Laws 1877, § 2123; California, Hitt. Code 1876, § 6741; Colorado, Gen. Stat. 1883, 1519; Dakota, cited also Civ. Code, § 993; Idaho, Gen. Laws 1881, Civ. Code, § 936; Indiana, Rev. Stat. 1881, § 4908; Iowa, Miller's Rev. Code 1880, § 3665; Michigan, How. An. Stat. 1882, § 6183; Minnesota, Gen. Stat. 1878, ch. 41, § 13; Montana, Gen. Law, 164; Nebraska, Comp. Stat. 1881, pt. 1, ch. 32, § 6; Nevada, Comp. Laws 1873, § 287; New York, Rev. Stat. (Banks Bros. 7th ed.) pt. 2, ch. 7, tit. 1, § 10; Oregon, Civ. Code, § 772; Utah, Comp. Laws 1876, § 1011; Civ Code, § 1207; Wisconsin, Rev. Stat. 1878, § 2305. In Alabama and Iowa, specially of sales of land where the purchaser has been put in possession by the vendor and part of the purchase money paid. Iowa, Miller's Rev. Code 1880, § 3665; Alabama, Code 1876, § 2123.

law is in the nature of a fraud.[1] Thus, where, upon a parol agreement for the purchase of an estate, a party, not otherwise entitled thereto, has been let into possession of the premises and made permanent and valuable improvements thereon, equity will generally enforce a specific performance of the contract.[2] And it cannot be shown in avoidance of such performance that the benefits received from the use of the lands fully or more than compensated him for all improvements and expenses.[3] The possession must be open, notorious and exclusive.[4] And where the possession is held under a pre-existing tenancy, and not in pursuance of the parol agreement, the general principle

[1] Bowers v. Bowers, 95 Pa. St. 477; Chambers v. Ala. Iron Co., 67 Ala. 353; Breckinridge v. Clinkinbeard, 2 Litt. (Ky.) 127; Arguello v. Edinger, 10 Cal. 150; Larison v. Burt, 4 W. & S. 27; Horn v. Ludington, 32 Wis. 73; Paine v. Wilcox, 16 Wis. 202; Ham v. Goodrich, 33 N. H. 32; Williams v. Morris, 95 U. S. 457; Ponce v. McWhorter, 50 Tex. 562; Foxcraft v. Lester, Colles' Parl. Cases, 108; Clinan v. Cooke, 1 Sch. & Lef. 22; Peck v. Peck, (Cal.) 19 Pac. Rep. 227. See 26 Cent. L. J. 345.

[2] Vielers v. Sisson, 10 W. Va. 12; Peckham v. Barker, 8 R. I. 17; Ingles v. Patterson, 36 Wis. 373; Neales v. Neales, 9 Wall. 1; Guynn v. McCauley, 32 Ark. 97; Fleming v. Carter, 87 Ill. 565; Troup v. Troup, 87 Pa. St. 149; Pfiffner v. S. & St. P. R. R. Co., 23 Minn. 343; Gregg v. Hamilton, 12 Kan. 333; Fall v. Hazelrigg, 45 Ind. 576; Freeman v. Freeman, 43 N. Y. 34; Ponce v. McWorter, 50 Tex. 562; West v. Bundy, 78 Mo. 407; Jamison v. Dunock, 95 Pa. St. 51; Everett v. Driley, (Kan.) 17 Pac. Rep. 661; Peck v. Williams (Ind.), 15 N. E. Rep. 270; Burns v. Fox (Ind.), 14 N. E. Rep. 541; Anderson v. Shockley, 82 Mo. 250; Cutsinger v. Ballard (Ind.), 17 N. E. Rep. 206; Hunter v. Miles (S. C.), 6 S. E. Rep. 907. But see Pugh v. Good, 3 W. & S. 56. And the right to specific performance is not lost by a temporary cessation of actual possession. Donn v. Stevens, 94 Ind. 181. Where improvements are insignificant and less than value of use of land, specific performance will not be enforced. Eason v. Eason, 61 Tex. 225. Permanent improvements made without possession is not sufficient. Ward v. Stewart 62 Tex. 333. A parol sale, to take effect after the death of the giver, the latter retaining possession till death, not good, no matter what improvements he may put on the land. Wooldrige v. Hancock (Tex.), 6 S. W. Rep. 818.

[3] Mims v. Lockett, 33 Ga. 9. But see Ann Berta Lodge v. Leverton, 42 Tex. 18; Eason v. Eason, 61 Tex. 225.

[4] Brown v. Lord, 19 Alb. L. J. 461; Aitkin v. Young, 12 Pa. St. 24; Detrick v. Sharrar, 95 Pa. St. 521; Gallagher v. Gallagher (W. Va.), 5 S. E. Rep. 297.

does not apply,[1] unless the parties so conduct themselves as to show that they are acting under the contract.[2] Nor does it apply to any acts which do not alter the position of the parties, or which may be set right by damages at law.[3] Thus, making a survey of the land, drawing a conveyance, preparing an abstract of the title, and the like acts, do not constitute such a part performance as will take a parol contract out of the Statute of Frauds. Neither does the payment of earnest or purchase money.[4] But if the party cannot be replaced in the same position by a recovery of the money paid, he will generally be entitled to specific performance.[5] It may be added that the same principle which establishes a parol contract where the title under it is sustained by part performance, is also applicable where the purchaser of real estate has waived by his conduct any objection to the title.[6]

[1] Brown v. Lord, 19 Alb. L. J. 461; Christy v. Bernhart, 14 Pa. St. 260; Sitton v. Shipp, 65 Mo. 302; Blanchard v. McDougall, 6 Wis. 167; Johnston v Glancy, 4 Blackf. 94; Wilmer v. Farris, 40 Iowa, 309; Wright v. Pucket, 22 Grat. 374; Phillips v. Thompson, 1 Johns. Ch. 131; Peckham v. Balch, 49 Mich. 179; Moore v. Gordon, 44 Ark. 334; Clark v. Clark (Ill.), 13 N. E. Rep. 553; Wainman v. Hampton (N. Y.), 18 N. E. Rep. 234.

[2] Blanchard v. McDougall, 6 Wis. 167; Spalding v. Conzelman, 30 Mo. 177.

[3] Parkhurst v. Van Cortland, 1 Johns. Ch. 274; Graham v. Theis, 47 Ga. 479; Moyer's Appeal 105 Pa. St. 432; Recknakle & Schmalz (Iowa), 33 N. W. Rep. 365.

[4] Clinan v. Cooke, 1 Sch. & Lef. 22; Ham v. Goodrich, 33 N. H. 32; Buckmaster v. Harrop, 7 Ves. 341; Cole v. Potts, 10 N. J. Eq. 67; Wood v. Jones, 35 Tex. 64; Horn v. Ludington, 32 Wis. 73; Poland v. O'Conner, 1 Neb. 50; Temple v. Johnson, 71 Ill. 13; Haight v. Child, 34 Barb. 186; Jackson v. Cutright, 5 Munf. 308; Helflin v. Milton, 69 Ala. 354; Felton v. Smith, 84 Ind. 254; Townsend v. Fenton, 30 Minn. 528; McPherson v. Wiswell, 16 Neb. 625; Forrester v. Flores, 64 Cal. 24; Anson v. Townsend (Cal.), 15 Pac. Rep. 49; Gallagher v. Gallagher (W. Va.), 5 S. E. Rep. 297; Ducie v. Ford (Mont.), 19 Pac. Rip. 41. Marriage not itself sufficient part performance. Peck v. Peck (Cal.), 19 Pac. Rep. 227; But see Sykes v. Bates, 26 Iowa, 521; McMurtrie v. Bennett, Harr. Ch. 124; Arnold v. Stephenson, 79 Ind. 126.

[5] Malins v. Brown, 4 N. Y. 403. See Townsend v. Houston, 1 Harr. 541; Munn v. Fabian, L. R. 1 Ch. App. 34; McMurtrie v. Bennett, Harr. Ch. 124; Slingerland v. Slingerland (Minn.), 39 N. W. Rep. 146.

[6] Taking possession and doing acts of ownership after he is aware that

The principle is well established that, if one person expends his money in making beneficial improvements on the land of another upon the faith of a parol contract by the latter to convey, where specific performance of the contract cannot be decreed because of uncertainty in the proof of its terms, a court of equity will decree compensation, to the extent of the value of such improvements, and, in some cases, will grant relief by declaring the same to be an equitable lien upon the property.[1]

§ 9. **The Effect of the Contract, and Herein of Specific Performance.**—The result in equity of a contract of sale is that the vendor is considered a trustee of the land for the vendee, who is likewise regarded as a trustee of the purchase-money for the former.[2] From whence it follows that the purchaser is entitled to the rents and profits of the estate from the date fixed for the completion of the contract, and the vendor is entitled to interest on the purchase-money for the same time.[3] But this rule is liable to exceptions. For example, where the interest is much more in amount than the rents and profits, and the delay in completing the contract is clearly made out to have been occasioned by the vendor, he will not be permitted to gain an advantage by his own wrong. In such case, where a defect in the title is the occasion of delay, the day at which the interchange of properties is treated as taking place is removed

objections exist, or simple acquiescence, may be taken as presumptive evidence of an intentional waiver. Palmer v. Richardson, 3 Strob. Eq. 16. If the vendee wishes to rescind the contract he must give up possession or do some other act indicating his intention. Thompkins v. Hyatt, 28 N. Y. 347; Mullin v. Bloomer, 11 Iowa, 360.

[1] McNamee v. Withers, 37 Md. 177; King's Heirs v. Thompson, 9 Peters, 204; Hoyt v. Hunt (Colo.), 15 Pac. Rep. 410; Woodbury v. Gardner, 77 Me. 68; Bowman v. Wolford, 80 Va. 213; Irwin v. Dyke, 114 Ill. 302; Neale v. Neale, 9 Wall. 1; Dawson v. McFaddin (Neb.), 34 N. W. Rep. 338. But see Abbott v. Baldwin, 61 N. H. 583.

[2] Seton v. Slade, 7 Ves. 265; Champion v. Brown, 6 Johns. Ch. 398; Springle v. Shields, 17 Ala. 297.

[3] Wing v. McDowell, Walk. Ch. 175; Stevenson v. Maxwell, 2 N. Y. 408; Pierce v. Nichols, 1 Paige, 244; Jones v. Jones, 49 Tex. 683.

from the time fixed for completion to the time at which a good title is first shown.[1]

When equity will compel specific performance of a contract, is a subject of enormous dimensions. We shall only attempt a very general statement, and refer the reader for the learning under this head to works which treat more especially upon that subject.[2] In the first place, the equity jurisdiction to enforce specific performance depends upon the inadequacy of the remedy afforded at law, which is an action for damages. And this may result either from the inadequacy of the damages, or from the impossibility of ascertaining such damages.[3] In an agreement to convey land, a penalty added to secure its performance, expressly inserted as "liquidated damages," will not deprive the party injured of his right to specific performance.[4] Though, if the contract were to do one of two things, namely, to convey certain lands or pay a certain amount of money, it would be satisfied by the payment of the money, and there would be ground for equitable procedure against the party having the election.[5] But the case must be such that the party can be fully and clearly indemnified and placed *in statu quo*.[6] In the next place, the *mutual* enforcement of the contract must be practicable. That is to say, the contract must be one which the defendant can fulfill, and the fulfillment of which on the part of both the plaintiff and

[1] Jones v. Mudd, 4 Russ, 118; Paton v. Rogers, 6 Mad. 236; Springle v. Shields, 17 Ala. 297.

[2] See 27 Cent. L. J. 228, for full statement of the general doctrine.

[3] Barnes v. Barnes, 65 N. C. 263; Williams v. Howard, 3 Murph. 74; Sullivan v. Tuck, 1 Md. Ch. 59; Ferrier v. Buzick, 2 Iowa, 138; White v. Schuyler, 31 How. P. 38; Aston v. Robinson, 49 Miss. 352. Where, as in North Carolina, the statute expressly declares that contracts to convey land shall be registered, specific performance of an unregistered contract will not be decreed. White v. Holly, 91 N. C. 67.

[4] Dooley v. Watson, 1 Gray, 414; Hooker v. Pynchon, 8 Gray, 550; Daily v. Litchfield, 10 Mich. 30; Hull v. Sturdevant, 46 Me. 34.

[5] Skinner v. Dayton, 2 Johns. Ch. 526; Mather v. Scoles, 35 Ind. 1; Patterson v. Cunningham, 12 Me. 506.

[6] Skinner v. White, 17 Johns. 357.

defendant can be judicially secured.[1] For instance, specific performance will not be decreed against a vendor who has no title.[2] But otherwise, if the vendor can make a good title on the final hearing of the bill for specific performance.[3] Nor will specific performance be enforced unless the contract be complete and certain, both as to parties and price and subject-matter.[4] And lastly, the contract must be supported by a valuable consideration, or at least by what is termed a meritorious consideration.[5] But mere inadequacy of consideration is not sufficient ground for setting aside the transaction, unless it be so gross as to raise a presumption

[1] Pack v. Gaither, 73 N. C. 95; Ferrier v. Buzick, 2 Iowa, 136; Dixon v. Rice, 23 N. Y. Sup. Ct. 422; Logan v. Bull, 78 Ky. 607; Hopkins v. Roberts, 54 Md. 312; Duff v. Hopkins, 33 Fed. Rep. 599; Stembridge v. Stembridge (Ky.), 7 S. W. Rep. 611.

[2] Brueggeman v. Jurgensen, 24 Mo. 87; Nicol v. Carr, 35 Pa. St. 381; Fitzpatrick v. Featherstone, 3 Ala. 40; Griffin v. Cunningham, 19 Gratt. 571; Shields v. Trammell, 19 Ark. 51; Jeffries v. Jeffries, 117 Mass. 184; Dobbs v. Norcross, 24 N. J. Eq. 327; Walton v. Means, 41 Hun, 311; Middleton v. Selby, 19 W. Va. 168; Cornell v. Andrews, 35 N. J. Eq. 7; Noyes v. Johnson, 139 Mass. 436. But where the vendee is willing to accept vendor's title, the vendor cannot plead a defect therein. Gartnell v. Stafford, 12 Neb. 546; Chrisman v. Partee, 38 Ark. 31; Adams v Valentine, 33 Fed. Rep. 1. Agreement to make conveyance "with full warranty only against" his heirs and representatives he is bound only to convey such title as he has. Thompson v. Hawley, 14 Oreg. 199. If the vendee knows that vendor is a married man at time of making contract he cannot refuse to take such title as vendor can give. Fortune v. Watkins, 94 N. C. 304. The doubt (as to title) must be more than a mere possibility. Webb v. Chisolm, 24 S. C. 487.

[3] Tice v. Freeman, 30 Minn. 389; Mathews v. Jarrett, 20 W. Va. 115; Sutton v. Myrick, 39 Ark. 424; Los Angeles Co-operative Assn. v. Phillips, 56 Cal. 539. Nor will courts enforce that which is only the basis of an agreement and not the contract itself. Losee v. Morey, 57 Barb. 561; Westfall v. Cathilly, 24 W. Va. 763; Ryan v. Davis, 5 Mont. 505; Litterall v. Jackson, 80 Va. 604; Reed v. Reed, 93 N. C. 462; Wagonbeast v. Whitney, 12 Oreg. 83; Magee v. McMannis, 70 Cal. 553.

[4] Nichol v. Nichol, 60 Tenn. 146; Hepburn v. Auld, 5 Cranch, 262; Seymour v. Delancey, 3 Cow. 445; Pierce v. Nichols, 1 Paige, 244; Jenkinson v. Fahey, 73 N. Y. 355; Logan v. Bull, 78 Ky. 607; Oakey v. Cook, 41 N. J. Eq. 350. And see Creigh v. Boggs, 19 W. Va. 240.

[5] Allen v. Davison, 16 Ind. 416; Lear v. Chouteau, 23 Ill. 39; Tierman v. Poor, 1 Gill & J. 228; Modisett v. Johnson, 2 Blackf. 431; Vasser v.

of fraud or imposition.[1] It may be added that courts of equity exercise a kind of judicial discretion over granting relief in *specie*, and therefore will not enforce a contract in which there is uncertainty, want of fairness, or which would impose great hardship on either party.[2] Relief will also be granted from mistakes, misrepresentations or fraud, upon the part of either.[3]

§ 10. **Whether a Deed, or an Agreement for Deed.**— The question has frequently arisen whether an instrument of writing is in effect a deed conveying property, or a mere agreement for a deed. The rights and liabilities in each case are of course distinct and different. It is often a nice question to determine what is the effect of a document, ambiguous upon its face; and of course each case will be decided, more according to its particular facts than any established rules, except the ordinary ones governing deeds and their requirements.[4] Though a document may in one part

Vassar, 23 Miss. 378; Abbott v. L'Hommedieu, 10 W. Va. 677; Curlin v. Hendricks, 35 Tex. 225; Aston v. Robinson, 49 Miss. 388; Popplein v. Foley, 61 Md. 381. Consideration of support for life not sufficient. Ikerd v. Beaver, 106 Ind. 483. And see Bourget v. Monroe, 58 Mich. 563.

[1] Andrews v. Andrews, 28 Ala. 432; Harrison v. Town, 17 Mo. 237; Seymour v. Delancey, 3 Cow. 445, and English cases cited; *s. c.*, 6 Johns. Ch. 222; Shepherd v. Bevin, 9 Gill, 32; Hale v. Wilkinson, 21 Gratt. 75; White v. McGannon, 29 Gratt. 511; Butler v. Haskell, 4 Desau. 687; Hardeman v. Burge, 10 Yerg. 202; Powers v. Hale, 25 N. H. 152; McCormick v. Malin, 5 Blackf. 509; Ready v. Noakes, 29 N. J. Eq. 499; Viele v. Troy & Boston R. R. Co., 21 Barb. 381; Shaddle v. Disborough, 30 N. J. Eq. 370.

[2] Morrison v. Peay, 21 Ark. 110; Rader v. Neal, 13 W. Va. 388; Gosse v. Jones, 73 Ill. 508; Bruck v. Tucker, 42 Cal. 346; Margraf v. Muir, 57 N. Y. 155; McClintock v. Laing, 22 Mich. 212; Astor v. Robinson, 49 Miss. 648; Snell v. Mitchell, 65 Me. 48; Shimer v. The Morris Canal Co., 27 N. J. Eq. 364; Tierman v. Gidney, 24 Wis. 190; Schmeling v. Kriesel, 45 Wis. 325, distinguishing Waterman v. Dutton, 6 Wis. 264; Taylor v. Williams, 45 Mo. 80; Grier v. Rhyne, 69 N. C. 346.

[3] Kelley v. Sheldon, 8 Wis. 258; Osborn v. Phelps, 19 Conn. 63; Whitaker v. Bond, 63 N. C. 290; Fiso v. Leser, 69 Ill. 394; Stevenson v. Buxton, 15 Abb. Pr. 357, and note; Berry v. Whitney, 40 Mich. 65; White and Tudor Eq. Cas. Vol. 2, pt. 2, p. 1041, and cases cited. Race v. Weston, 86 Ill. 91; Craigh v. Boggs, 19 W. Va. 240.

[4] Moody v. McCawn, 39 Ala. 595; Doe v. Smith, 6 East. 530; Jackson

use the formal and apt words of conveyance, yet if from other parts of the instrument, taken and compared together, it appears that a mere agreement for a conveyance was all that was intended, the intent shall prevail [1]

ARTICLE II.

DEEDS MAY BE OF WHAT MATERIAL.

SECTION.

13. Definition of deed.
14. Must be written upon paper or parchment.
15. May be printed, or part printed and part written.
16. Should be written or printed with ink.

§ 13. **Definition of Deed.**—A deed is defined by the elementary writers to be "a writing sealed and delivered by the parties." [2] The name deed, in Latin *factum*, is applied to it because it is supposed to be the most solemn and authentic act that a man can possibly perform with reference to the disposal of his property. Therefore a man shall be estopped by his own deed, and will not be permitted to aver or prove anything in contradiction of that which he has once so solemnly and deliberately avowed.[3] The law has thrown around deeds many guards designed to

v. Clark, 3 Johns. 424; Atwood v. Cobb, 16 Pick. 227; Ives v. Ives, 13 Johns. 235; Jackson v. Kisselbrack, 10 Johns. 335.

[1] Jackson v. Myers, 3 Johns. 395; Jackson v. Monterief, 4 Wend. 26; Stouffer v. Coleman, 1 Yeates, 393; Neave v. Jenkins, 2 Yeates, 107; Sherman v. Dill, 4 Yeates, 295; Jackson v. Blodgett, 16 Johns. 172. See Webb v. Mullins, 78 Ala. 111. Under Code 1876, Ala., § 2948, any instrument in writing, signed by the grantor, or his agent having a written authority, with or without a seal is effectual to transfer the legal title if such was the intention. Tatum v. Tatum (Ala.), 1. South. Rep. 195.

[2] Co. Litt. 171. While no prescribed form is essential to the validity of a deed, there must be enough to show an intention to convey. Bell v. McDuffie, 71 Ga. 264. See also Tatum v. Tatum (Ala.), 1 South. Rep. 195.

[3] Plowd. 434; 2 Bl. Com. 295.

preserve their solemn and authentic character, some of which we shall proceed to mention. In nearly all the States by statute no interest in real estate can be conveyed or assigned or created without a deed.[1]

§ 14. **All Deeds must be Written upon Paper or Parchment.**—The reason given for this rule is that such materials are less likely to be altered, vitiated or corrupted.[2] It must be confessed, however, that at the present day this assumption is not by any means self-evident. And it is difficult to understand why any other material of a suitable nature should not be deemed sufficient.

Previous to the passage of the English Statute of Frauds, conveyances of land were usually without writing, and evidenced by overt acts, by which seizin was given. But by the above statute,[3] all estates and interests in lands "made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only," excepting "all leases not exceeding the term of three years," thus rendering a writing necessary in the conveyance of land. This statute has been either impliedly accepted or expressly adopted in all of the United States. The laws of most States specially require all deeds of real estate to be in writing and signed by the party making them.[4]

§ 15. **A Printed Deed, or Part Printed and Part Written,** is a sufficient compliance with the Statute of Frauds, that all deeds shall be in writing; and it would seem by analogy to agreements for deeds required by the statute, that a printed signature is sufficient, if it appear to have been so intended.[5] But it was held not a sufficient

[1] See Stimson Amer. Stat. Law, p. 196, § 1560.

[2] 1 Co. Litt. 299*a*; Wood, Conv. 126; Shep. Touch. 50, 54; 2 Bl. Com. 297.

[3] 29 Charles II., ch. 3, §§ 2, 3.

[4] See as to the different provisions Stimson Amer. Stat. Law, p. 196, § 1560.

[5] Browne on Stat. of Frauds, § 356; Sanderson v. Jackson, 3 Esp. 181;

signing within the Statute of Frauds of New York, which required the instrument to be subscribed.[1] It is presumed that a printed signature to a deed would be held insufficient wherever signing is essential. It may be remarked under this head that, in an instrument which is part printed and part written, if one part be inconsistent with or repugnant to the other, preference will generally be given to the written part.[2]

§ 16. **It is Usual that a Deed is Written or Printed and Subscribed with Ink,** as that is, in general, the most difficult to be effaced. In the case of a memorandum, which the Statute of Frauds requires to be in writing, and subscribed by the party to be charged, writing with a lead pencil has frequently been held to be as valid as with pen and ink.[3] But the question as to whether a deed written and subscribed with a pencil is void, does not seem to have arisen. Prudence would, at least, seem to dictate the use of pen and ink until the legislature or higher courts sanction a different mode.

Sellers v. Sellers (N. C.), 3 S. E. Rep. 917. The signature of grantor in a deed written by another at his request, or adopted by him as his own, has the same validity as if written by him. Conlon v. Grace (Minn.), 30 N. W. Rep. 880; Nye v. Lowry, 82 Ind. 316. See Sanders v. Hackney, 10 Lea (Tenn.), 194; Gaston v. Weir (Ala.), 4 South. Rep. 258, as to effect of deed when grantor's name is not subscribed to it.

[1] Vielie v. Osgood, 8 Barb. 132; Davis v. Shields, 26 Wend. 351.

[2] 2 Par. Cont., 6th ed. 516; Robertson v. French, 4 East, 130; Weisser v. Maitland, 3 Sandf. 318.

[3] Merritt v. Clason, 12 Johns. 102; Davis v. Shields, 26 Wend. 354; Sanderson v. Jackson, 2 Bos. & Pul. 238.

ARTICLE III.

MUST BE COMPLETELY WRITTEN BEFORE DELIVERY.

SECTION.

18. Alterations, to be valid, must be made before delivery.
19. Burden of proof.
20. Executed contract not affected by subsequent alterations.
21. Filling up blanks.

§ 18. **Alteration Must be Made before Delivery.**—A blank, signed, sealed and delivered, and then filled up, is no deed; but a deed may be signed and sealed and then filled up, if this is done before delivery.[1] Any alteration made after delivery will either avoid the deed or will be of no effect. If the contract thereby evidenced is an executory one, any fraudulent alteration will avoid it;[2] but if the alteration be in an unimportant matter and made by a stranger without the knowledge or assent of the holder, or by consent of the maker, it will not affect the deed—it may yet be read as it was originally executed.[3] A material alteration of a sealed instrument, if made by a party claiming to recover upon such instrument or by any person under him, renders it void.[4] It is a well settled rule that

[1] Simms v. Hervey, 19 Iowa, 190; Duncan v. Hodges, 4 McCord, 239; Perminter v. McDaniel, 1 Hill (S. C.), 297; People v. Organ, 27 Ill. 29; Gilbert v. Anthony, 1 Yerg. 69; Wynne v. Governor, *Id.* 149; McClung v. Steen, 32 Fed. Rep. 375. And see as to alterations of mortgage. Heath v. Blake (S. C.), 5 S. E. Rep. 842.

[2] Wallace v. Harmstad, 15 Pa. St. 462.

[3] Shep. Touch. 69; Com. Dig. Fait, F, 1; Malin v. Malin, 1 Wend. 625; Waring v. Smyth, 2 Barb. Ch. 119; Lee v. Alexander, 9 B. Mon. 25; Robertson v. Hay, 91 Pa. St. 242; Moore v. Ivers, 83 Mo. 29. And see Havens v. Osborn, 36 N. J. Eq. 426.

[4] Waring v. Smyth, 2 Barb. Ch. 133; Com. v. Hanion, 1 Nott & Mc. 554; Heffelfinger v. Shutz, 16 Serg. & R. 41; Hatch v. Hatch, 9 Mass. 307. And it seems from some of the authorities that any alteration of an instrument, though immaterial, if made by a party claiming a benefit under it, avoids it so far as respects the remedy by action on it. Nunnery v. Cotton, 1 Hawks. 222; Wright v. Wright, 2 Halst. 175; Lewis v.

an alteration, even in a material part, may be made in a deed, after execution, if it is proved to have been done by consent of all the parties.[1] A deed thus altered in a material part takes effect from the time of its alteration, as a re-execution of it.[2]

§ 19. **Burden of Proof.**—Where an alteration, such as an erasure or interlineation, appears on the face of an instrument, the question as to when the same is presumed to have been made, is not well settled. On the one hand, it is argued that the burden is upon the party having the instrument in possession, or offering it in evidence to prove its genuineness;[3] or, in other words, that such alterations are presumed to have been made after its execution and delivery.[4] But this has been denied as contrary to the principle of the law, which never presumes wrong.[5] It has also been held that

Payne, 8 Cow. 71; Hunt v. Adams, 6 Mass. 519; Bank of Limestone v. Penick, 5 Monroe, 31; Johnson v. Moore, 33 Kan. 90. But see *contra*, Nichols v. Jonson, 10 Conn. 192. Material alteration by a stranger does not affect its validity. Robertson v. Hay, 91 Pa. St. 242.

[1] Wooley v. Constant, 4 Johns. R. 54; Speake v. United States, 9 Cranch, 28; Barrington v. Bank of Washington, 14 Serg. & R. 405; Stephens v. Graham, 7 *Ib.* 505; Smith v. Weed, 2 Barb. 54; Willard v. Clark, 7 Mete. 435; Hills v. Barnes, 11 N. H. 395; Berry v. Haines, 4 Wheat. 17; Stiles v. Probst, 69 Ill. 382; Havens v. Osborn, 36 N. J. Eq. 426. Alteration in description of one tract, made after delivery, will not affect its validity as to other tracts embraced therein. Burnett v. McClung, 78 Mo. 676. And such consent may be proved by parol. Speake v. United States, 9 Cranch, 28. Insertion of additional name after that of grantee after execution, without consent and with no fraud. *Held:* no effect, and conveys no title to grantee inserted in deed. John v. Hatfield, 84 Ind. 75. Question of consent is for the jury, but whether it is a material alteration is for the court. Keen v. Monroe, 75 Va. 424.

[2] Penny v. Corwithe, 18 Johns. 499; Tompkins v. Corwin, 9 Cow. 255.

[3] United States v. Linn, 1 How. 104; Clifford v. Parker, 2 Mann. & G. 909; Ely v. Ely, 6 Gray, 439, 441. See 1 Greenl. on Ev., § 564; Smith's Lead. Cas., 5th Am. Ed. 961; Robinson v. Myers, 67 Pa. St. 9. As to lease. Burguin v. Bishop, 91 P. St. 336.

[4] Montag v. Linn, 23 Ill. 551; Van Horn v. Bell, 11 Iowa, 465; Aeker v. Ledyard, 8 Barb. (N. Y.) 514. But compare Pullen v. Shaw, 3 Dev. (N. C.) 238; Prevost v. Gratz, 1 Pet. C. C. R. 364; Dow v. Jewell, 18 N. H. 340; Morris v. Vanderen, 1 Dall. 67.

[5] Doe v. Catamore, 16 Ad. & E. (N. S.) 745; 1 Greenl. on Ev., § 564, note.

material alterations are presumed to have been made before execution of the instrument.[1] The latter appears to be the better opinion, if, indeed, any presumption whatever is to be indulged in, unless peculiar circumstances of suspicion are patent upon the face of the instrument; and even then, the whole question is one for the jury to settle upon the facts, when, where and with what intent the alteration was made.[2]

§ 20. **Considered as an Executed Contract,** a deed cannot be affected by any subsequent alteration. Even its cancellation or destruction will not, of itself, revest in the grantor the title which has once passed, although it may have been done by mutual consent and for that purpose.[3] But a different rule seems to prevail in New Hampshire. In that State the re-delivery by the grantee to his grantor of an unrecorded deed, with the intention and for the purpose of

[1] Gordon v. Sizer, 39 Miss. 805; Knight v. Clement, 8 Ad. & E. 215; Bailey v. Taylor, 11 Conn. 531; Mathews v. Coalter, 9 Mo. 696; Herrick v. Malin, 22 Wend. 388; Wickes v. Caulk, 5 Har. & J. 36; Cox v. Palmer, 1 McCrary C. C. 431; Halton v. Kemp, 81 Mo. 661; Banks v. Lee, 73 Ga. 25.

[2] McCormick v. Fitzmorris, 39 Mo. 34; Robinson v. Myers, 67 Pa. St. 9; Little v. Herndon, 10 Wall. 26; Cole v. Hills, 44 N. H. 227; Beaman v. Russell, 20 Vt. 205; Smith v. McGowen, 3 Barb. 404; 1 Greenl. on Ev., § 564.

[3] Woods v. Hilderbrand, 46 Mo. 284; Tibeau v. Tibeau, 19 Mo. 78; Strawn v. Norris, 21 Ark. 80; Fonda v. Sage, 46 Barb. 109; Parshall v. Shirts, 54 Barb. 99; Linker v. Long, 64 N. C. 296; Jackson v. Gould, 7 Wend. 364. But a material alteration avoids the deed so far as an action on the covenant is concerned. Herrick v. Malin, 22 Wend. 388; Chessman v. Whittemore, 23 Pick. 231; Wallace v. Harmstad, 15 Pa. St. 462. The statutes of California and Dakota provide that the destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act. The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act. Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section. California, Hitt. Code 1876, §§ 1699, 1701; Dakota, Civ. Code, §§ 970, 972.

re-vesting the title in the grantor, if there be no subsisting equities in third parties, re-vests the title accordingly, upon the principle of estoppel.[1] And in Indiana, where a grantee surrendered an unrecorded deed back to his grantor to be destroyed, for the purpose of re-vesting in him the title, in an action between the parties the court held that the grantee was estopped from proving the contents of the deed and claiming under it.[2] It was also held by the Supreme Court of the United States, in a similar case, that, under the law of Wisconsin, such a deed could not prevail against a subsequent *bona fide* purchaser from the grantor.[3] But that decision turned more on the registry act than upon the alteration of the instrument. Whether a deed that has been fraudulently altered may be read in evidence in support of the title acquired under it, is not well settled. Some of the courts hold that a fraudulent alteration of a conveyance by the grantee, in a material matter, utterly destroys it, and that while the title does not thereby reinvest, the deed cannot be used by him for any purpose, either to sustain an action upon the covenants or as evidence of his title;[4] and in case of an estate which lies in grant and cannot exist without deeds, that the estate itself, as well as all remedy upon the deed, will be utterly gone.[5] But other courts have permitted altered deeds to be read in evidence in support of the title thereby created.[6]

§ 21. **Filling up Blanks.**—If there are blanks left in a deed, affecting its meaning and operation in a material way,

[1] Mussey v. Holt, 4 Fost. 248; Dodge v. Dodge, 33 N. H. 487; Sawyer v. Peters, 50 N. H. 143.

[2] Thompson v. Thompson, 9 Ind. 323.

[3] Parker v. Kane, 22 How. (U. S.) 1. But see Arrison v. Harmstad, 2 Pa. St. 191; Wallace v. Harmstad, 15 Pa. St. 462.

[4] Withers v. Atkinson, 1 Watts, 236; Chesley v. Frost, 1 N. H. 145; Babb v. Clemson, 10 Serg. & R. 419; Newell v. Mayberry, 3 Leigh R. 250; Bliss v. McIntyre, 18 Vt. 466; Wood v. Hilderbrand, 46 Mo. 284.

[5] Moore v. Sotter, 3 Bulstr. 79; Lewis v. Payne, 8 Cow. 71; 1 Nels. Ab. 625; Bliss v. McIntyre, 18 Vt. 466.

[6] Doe v. Hirst, 3 Stark. R. 60; Jackson v. Gould, 7 Wend. 364; Lewis v. Payne, 8 Cow. 71.

and they are filled up after execution and delivery, the deed will be void.[1] On the other hand, a blank in a deed or bond, otherwise perfect, and where the words inserted would be implied by construction, may be filled up, if done with the consent or authority of the grantor or obligor.[2] It was held by LORD MANSFIELD in *Texira* v. *Evans*,[3] that a bond was valid which was given with the name of the obligee and sum of money in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case has been severely and justly criticised.[4] and in so far, at least, as it decides that the leaving of a blank for the amount of money to be inserted will not invalidate the deed, does not seem to have been extensively followed, and has been directly overruled in a later English case.[5] In Pennsylvania, New York and Alabama the law of *Texira* v. *Evans* has been to a certain extent recognized, and it has been held there, as in some other States, that the execution is not invalidated by the insertion of the grantee's name, after delivery, in accordance with the intention of the grantor, express or implied.[6]

[1] Ingram v. Little, 14 Ga. 173; Lockhart v. Roberts, 3 Bibb, 361; Harrison v. Tiernans, 4 Rand. 179; Parminter v. McDaniel, 1 Hill (S. C.), 267; Hibblewhite v. McMorine, 6 M. & W. 200; Gilbert v. Anthony, 1 Yerg. 69; Ayres v. Harnes, 1 Ohio, 173.

[2] As to extent of this principle, and what blanks may thus be filled up, see the opinion of Marshall, C. J., in United States v. Nelson, 2 Brock. 64. Effect of omission of name of grantee. Sheppard v. Harrison, 54 Tex. 91. Deed to which name of grantor has been affixed by grantee is valid. Clough v. Clough, 73 Me. 487.

[3] Cit. 1 Anst. 228.

[4] Shep. Touch., notes by Preston, 68.

[5] Hibblewhite v. McMorine, 6 M. & W. 213. But see Wooley v. Constant, 4 Johns. 59; Sigfried v. Levan, 6 S. & R. 308.

[6] Stahl v. Berger, 10 S. & R. 170; *Ex parte* Kerwin, 8 Cow. 118; Duncan v. Hodges, 4 McCord (S. C.), 239; Knapp v. Maltby, 13 Wend. 587; *Ex parte* Decker, 6 Cow. 60; Kortright v. Commercial Bank of Buffalo, 22 Wend. 348; Devin v. Himer, 29 Iowa, 300. But see Channcey v. Arnold, 24 N. Y. 330; Burns v. Lynde, 6 Allen, 305; Drury v. Foster, 2 Wall. 24; Simms v. Hervey, 19 Iowa, 274; Viser v. Rice, 33 Tex. 156. Consent may be implied. Smith v. Crooker, 5 Mass. 538; Hale v. Russ, 1 Greenl. 334; Hunt v. Adams, 6 Mass. 519; Brown v. Pinkham, 18 Pick. 172. Held in California that such deed in name of grantee inserted

And in a recent case in Texas it was held that, when a party delivers a deed duly executed, with parol authority to fill blanks, and this is done, he is estopped from denying its validity against a subsequent purchaser for value, and without notice of the manner in which the deed was executed.[1] It was at one time doubted whether a deed executed in blank and placed in that condition in the hands of a third party with parol authority to fill up the blanks in the absence of the maker and then deliver it, would be valid when so delivered. The better opinion at this day is that the power is sufficient.[2] It is believed that in the cases which hold a different view it will generally be found that the blanks were fraudulently filled contrary to the intention of the grantor.[3] A married woman, who is disabled in law from delegating a power, cannot authorize a third party to fill up blanks and deliver her deed.[4] There can be no acknowledgment as contemplated by the statue until the blanks are filled and the instrument complete.[5] Though in Massachusetts the court held that, when a deed was signed by a wife, before the description of the land or any other writing had been made in the deed, in an action upon the covenant of warranty against the grantor, the deed was not invalidated.[6]

after delivery does not convey title, and will not afford ground for interposition of equity where purchaser has entered and paid purchase price. De Arguelle v. Bours, 67 Cal. 447.

[1] Radsdale v. Robinson, 48 Tex. 380; Sheppard v. Harrison, 54 Tex. 91. See Fisher v. Beckwith, 30 Wis. 55; Pence v. Arbuckle, 22 Minn. 417.

[2] Field v. Stagg, 52 Mo. 534; Burnside v. Wyman, 49 Mo. 356; Drury v. Foster, 2 Wall. 24; Inhabitants South Boswick v. Huntress, 53 Me. 90; McDonald v. Eggleson, 26 Vt. 161; Speak v. United States, 9 Cranch. 28; Smith v. Crooker, 5 Mass. 538; Burns v. Lynde, 6 Allen, 305; Owen v. Perry, 25 Iowa, 412; Clark v. Allen, 34 Iowa, 190; Van Etta v. Evenson, 28 Wis. 33; Swartz v. Ballow, 47 Iowa, 188; McClung v. Steen, 32 Fed. Rep. 375. But see Simms v. Hervey, 19 Iowa, 297; Chauncey v. Arnold, 24 N. Y. 330.

[3] Cooper v. Page, 62 Me. 192; Upton v. Archer, 41 Cal. 85; Schintz v. McManamy, 33 Wis. 299; Van Amringe v. Morton, 4 Whart. 382.

[4] Drury v. Foster, 2 Wall. 24; Burnside v. Wayman, 49 Mo. 356.

[5] Drury v. Foster, 2 Wall. 24. See Viser v. Rice, 33 Tex. 139; Chase v. Palmer, 29 Ill. 306 Simms v. Hervey, 19 Iowa, 288.

[6] Furnas v. Durgin, 119 Mass. 501.

ARTICLE IV.

OF THE PARTIES TO A DEED.

SECTION.

23. All persons competent, except those under special disability.
24. As to a disseizee.
25. Infants.
26. Persons of non-sane mind.
27. Married woman.
28. Duress.
29. Undue influence.
30. Intoxication.
31. Joint tenants.
32. Deed from husband to wife.
33. The capacity of grantees.
34. Parties must be *in esse* at the time of the conveyance.

§ 23. **All Persons in Possession are Prima Facie Capable both of Conveying and Purchasing,** unless the law places them under some particular disability on account of infancy, coverture, want of reason, duress, or where from other causes they are disqualified from making a conveyance of any particular estate.[1] And many persons who are thus rendered incapable in a certain degree may, in some mode and to some extent, alien or acquire title to land. In this country the right of alienation of land is almost unlimited and unrestricted. Under the common law, the practice of subinfeudation practically prevented or restricted alienation until the statute *quia emptores* 18 Edw. I. gave every freeholder a right to sell all or part of his land, and, as it is said, secured free alienation of land and abolished any tenure between grantor and grantee.[2] This statute has

[1] "All persons owning lands not held by an adverse possession shall be deemed to be seized and possessed of the same." Iowa, Miller's Rev. Code 1880, § 1928; Kansas, Comp. Laws 1879, ch. 22, § 1. See also Stimson's Amer. Stat. §§ 1104, 1105, 1410.

[2] 1 Washburn, Real Prop. (5th Ed.) 59, 68.

been adopted as a part of the common law in most of the States,[1] but has not been adopted in Pennsylvania.[2]

§ 24. **As to a Disseizee.**—It is a very ancient rule of law that rights, not reduced to possession, should not be assignable to a stranger, on the ground that such alienation tends to increase litigation. The common law regarded the conveyance of land of which one was disseized as champertous and an act of maintenance. Similar statutes against the granting of pretended titles have been enacted by several of the States.[3] In those States, a deed, made by one against whom the land conveyed is held adversely by claim of title, is inoperative to convey the legal title as against the party who has the actual seizin.[4] But though the deed would be void as to the person holding adversely at the time it was made, and to those claiming under him, between the parties and as to the rest of the world it would be effectual and valid.[5] And it has been held that, when the deed of a per-

[1] Van Rensselaer v. Hays, 19 N. Y. 60.

[2] Ingersoll v. Sergeant, 1 Whart. 337; Franciscus v. Reigart, 4 Watts, 98; 2 Sharswood Bl. Com. 42 *n*; Wallace v. Harmestad, 44 Penn. St. 495.

[3] Jackson v. Ketchum, 8 Johns. 479; Jackson v. Andrews, 7 Wend. 152; Murray v. Ballou, 1 Johns. Ch. 573; Ludlow v. Kidd, 3 Ohio, 541. Such statutes do not find general favor in this country, and in some of the States have been abolished. Roberts v. Cooper, 20 How. 467. In many States, any person claiming a right or title to real estate, although out of possession, and there be an adverse possession, may sell and transfer his interest as fully as if in actual possession. But in other States the common law is followed; and a grant, devise, or conveyance of real estate, made and delivered when the estate is in the actual possession of a person claiming title adversely to the grantor, is absolutely void. Stimson's Amer. Stat. p. 174, § 1401. In Tennessee, the seller must have been in possession one year before the sale. Code 1884 (Mill. & Vert.), §§ 2446, 2448.

[4] Way v. Arnold, 18 Ga. 181; Thurman v. Cameron, 24 Wend. 87; Dame v. Wingate, 12 N. H. 291; Loud v. Darling, 7 Allen, 205; Burdick v. Burdick, 14 R. I. 574.

[5] University of Vermont v. Joslyn, 21 Vt. 61; Betsey v. Torrence, 34 Miss. 138; Livingstone v. Peru Iron Co., 9 Wend. 511; Farnum v. Peterson, 111 Mass. 151; Livingston v. Proseus, 2 Hill, 526; Edwards v. Roys, 18 Vt. 473; Stockton v. Williams, 1 Doug. (Mich.) 546; Wade v. Lindsey 6 Met. 407; White v. Fuller, 38 Vt. 204; Park v. Pratt, *Id.* 553. But

son disseized is given, if the grantee is in possession, or if the disseized is then in possession and afterwards abandons it and the grantee takes possession, the deed conveys a good title.[1]

§ 25. **Infants,** which include all persons who have not arrived at the age of maturity, are incapable of making a binding disposition of their property. But it is now well settled that the deed of an infant is not, ordinarily, void, but merely voidable.[2] Nor can it be avoided until he becomes of age.[3] And being a personal privilege, no one but himself can call it in question.[4] In several of the States, it has been held that an infant, in order to avoid his deed, must do so within a reasonable time after coming of age.[5] But such decisions seem contrary to reason and the weight of

see Brinley v. Whiting, 5 Pick. 348; Gibson v. Shearer, 1 Murphy (N. C.), 114; Tabb v. Baird, 3 Call. (Va.) 475; Steeple v. Downing, 60 Ind. 484.

[1] Farnum v. Peterson, 111 Mass. 148; McMahon v. Bowe, 114 Mass. 140; Snow v. Orleans, 126 Mass. 453.

[2] Zouch v. Parsons, 3 Burr. 1794, 1805; Phillips v. Green, 3 A. K. Marsh. 7; Tucker v. Moreland, 10 Pet. 58; Whitney v. Dutch, 14 Mass. 457, 462; Roof v. Stafford, 7 Cow. 180; Kendall v. Lawrence, 22 Pick. 540; Boston Bank v. Chamberlain, 15 Mass. 211; Breckenridge v. Ormsby, 1 J. J. Marsh. 245; Jenkins v. Jenkins, 12 Iowa, 195; Slaughter v. Cunningham, 24 Ala. 260; Harrod v. Myers, 21 Ark. 592; Moore v. Aberthnay, 7 Blackf. (Ind.) 942; Cook v. Toumbs, 36 Miss. 685; Ferguson v. Bell, 17 Mo. 347; Cummings v. Powell, 8 Tex. 80; Welborn v. Rogers, 24 Ga. 558; Gillespie v. Bailey, 12 W. Va. 70. See also as to leases. Griffith v. Schwenderman, 27 Mo. 412; Baxter v. Bush, 29 Vt. 465. And mortgages. Roberts v. Wiggin, 1 N. H. 73; State v. Plaisted, 43 *Id.* 413; Palmer v. Miller, 25 Barb. 399. But see Adams v. Ross, 30 N. J. L. 505.

[3] Bool v. Mix, 17 Wend. 119; McCormick v. Leggett, 8 Jones (N. C.), L. 425.

[4] Oliver v. Houdlet, 13 Mass. 237; Nightingale v. Withington, 15 *Id.* 272; Worcester v. Eaton, 13 *Id.* 371; Van Bramer v. Cooper, 2 Johns. (N. Y.) 279; Hartness v. Thompson, 5 *Id.* 160; Rose v. Daniel, 3 Brev. (S. C.) 438; Brown v. Caldwell, 10 S. & R. 114.

[5] Kline v. Beebe, 6 Conn. 494; Holmes v. Blagg, 8 Taunt. 35; Richardson v. Bright, 9 Vt. 368; Wallace v. Lewis, 4 Harring. 75; Wright v. Germain, 21 Iowa, 585; Jones v. Butler, 30 Barb. 641; Flinn v. Powers, 36 How. Pr. 289; Bingham v. Bailey, 55 Tex. 281; Childs v. Dobbins, 55 Iowa, 205. Infant has seven years after coming of age in Arkansas to disaffirm deed. Kountz v. Davis, 34 Ark. 590; Nathan v. Arkright, 66 Ga. 179. As to what is reasonable time under the statute. Hoover v. Kin-

authority. The true doctrine, and that adopted by the United States Supreme Court, is, that mere acquiescence, after coming of age, though extended to an unreasonable length of time, will not amount to an affirmance,[1] though a deed may be ratified and affirmed with a less degree of formality than is required to make a grant. There is no doubt that an infant may avoid his deed by different means after coming of age, according to the nature of the act and the circumstances of the case.[2] Although, after coming of age, he may avoid a deed made during infancy, he must as a general thing restore the money or other property which he received as a consideration for the sale,[3] and in such cases it is immaterial whether the contract of sale be executed or executory, whether he made a deed for the land or not.[4] In the case of an executory contract for the sale of land, it seems to be well settled that if, during his infancy, he has wasted, sold or otherwise ceased to possess the property which is the consideration of his contract, so that he cannot return it, or cannot return except in its deteriorated condition, such inability will not hinder him from avoiding his contract generally.[5] But it may be regarded as questionable whether

sey Plough Co., 55 Iowa, 668; Stringer v. Northwestern Life Ins. Co., 82 Ind. 100; Wilson v. Branch, 77 Va. 65. As to what is reasonable, Sims v. Baldwin, 86 Ind. 87; Sims v. Smith, *Idem*, 577; O'Brien v. Gaslin, 20 Neb. 347.

[1] Irvine v. Irvine, 9 Wall. 626; New Hampshire Co. v. Noyes, 32 N. H. 351; Voorhies v. Voorhies, 24 Barb. 153; Tucker v. Mooreland, 10 Pet. 59, and notes; Drake v. Ramsey, 5 Ohio, 251; Cresinger v. Welch, 15 Ohio, 156; Boody v. McKinney, 23 Me. 517; Gillespie v. Bailey, 12 W. Va. 70; Huth v. Carondelet, 56 Mo. 202.

[2] Tucker v. Moorland, 10 Pet. 58.

[3] Womack v. Womack, 9 Tex. 397; Pursley v. Hays, 17 Iowa, 311; Stuart v. Baker, 17 Tex. 417; Smith v. Evans, 5 Humph. 70; Badger v. Phinney, 15 Mass. 359; Hillyer v. Bennett, 3 Edw. Ch. 222. But see Miles v. Lingerman, 24 Ind. 385. But see Dawson v. Helmes, 30 Minn. 107.

[4] Gillespie v. Bailey, 12 W. Va. 92.

[5] Mustard v. Wohlford, 15 Gratt. 343; Bedinger v. Wharton, 27 Gratt. 857; Boody v. McKinney, 23 Me. 517; Price v. Furman, 27 Vt. 271; Robbins v. Eaton, 10 N. H. 562; Fitts v. Hall, 9 N. H. 441; Brantley v. Wolf, 60 Miss. 420.

the rule is applicable to executed contracts.[1] The court, in *Gillespie* v. *Bailey*,[2] without deciding the question in point, it not being necessary to the decision of the case, say very truly: "It seems to make but little substantial difference whether the infant who has sold his patrimonial estate and been paid for it in full, and has during his infancy wasted the purchase money in extravagance and gambling, has executed a deed to the purchaser at the time of the sale or only signed a contract to convey the land." As to what acts shall be deemed and taken to be an affirmance of the deed of an infant, after he has arrived at the age of maturity, and what not, the courts are not agreed. We have collected and cite below a few of the cases in which particular circumstances have been construed as a ratification, or disaffirmance of such deeds.[3]

§ 26. **Persons of Non-Sane Mind** are also incapacitated from binding themselves by deed, though a want of absolute and perfect soundness of mind does not necessarily affect the capacity to make a valid conveyance, provided the mind is still fully capable of comprehending the import of the act.[4] Nor will mere weakness of intellect render a deed

[1] Brawner v. Franklin, 4 Gill, 463; Mustard v. Wohlford, 15 Gratt. 343. But see Brantley v. Wolf, 60 Miss. 420; Brandon v. Brown, 106 Ill. 519.

[2] 12 W. Va. 94.

[3] Robbins v. Eaton, 10 N. H. 561; Howe v. Howe, 99 Mass. 98; Ferguson v. Bell, 17 Mo. 347; Bostwick v. Atkin, 3 N. Y. 58; Hartman v. Kendall, 4 Ind. 403; Derrick v. Kennedy, 4 Port. (Ala.) 41; Block v. Hills, 36 Ill. 376; Phillips v. Green, 5 T. B. Mon. (Ky.) 334; Dana v. Combs, 6 Me. 89; Lynde v. Budd, 2 Paige (N. Y.), 191; Norris v. Wait, 2 Rich. (S. C.) 148; Peterson v. Laik, 24 Mo. 541; Huth v. Carondelet, 56 Mo. 202; Blankenship v. Stout, 25 Ill. 132; Cole v. Pennoyer, 14 *Id.* 158; Hughes v. Watson, 10 Ohio, 127; Bool v. Mix, 17 Wend. 119; Riggs v. Fisk, 8 Cent. L. J. 325; Welch v. Welch, 83 Ind. 382; Sims v. Bardoner, 86 Ind. 87; Wilson v. Branch, 77 Va. 65; Goodnow v. Empire Lumber Co., 31 Minn. 468; Buchanan v. Griggs, 18 Neb. 121; Vallandingham v. Johnson (Ky.), 3 S. W. Rep. 173; Ellis v. Alford (Miss.), 1 South. Rep. 155.

[4] Henderson v. McGregor, 30 Wis 78; Johnson v. Phifer, 6 Neb. 401; Hovey v. Hobson, 55 Me. 256; Miller v. Craig, 36 Ill. 109; Speers v. Sewell, 4 Bush (Ky.), 239; Hovey v. Chase, 52 Me. 304; Davis v. Culver, 13 How. (N. Y.) Pr. 62; Rippy v. Gant, 4 Ired. (N. C.) Eq. 443;

voidable; but, to set aside a conveyance, it must also be shown that there was fraud in the party contracting, or that some undue advantage has been taken of that weakness, in procuring its execution.[1] The deed of an idiot or insane person, not under guardianship, passes a seizin, and is only regarded as voidable.[2] But the deed of a person of non-sane mind, who has for that cause been placed under guardianship, is void.[3]

§ 27. **Married Women.**—At common law, the deed of

Dennett v. Dennett, 44 N. H. 531; Osterhout v. Shoemaker, 3 Hill (N. Y.), 37; Odell v. Buck, 21 Wend. (N. Y.) 142; Darby v. Hayford, 56 Me. 246; Halley v. Troester, 72 Mo. 73; Rogers v. Blackwell, 49 Mich. 192; Cole v. Cole (Neb.), 31 N. W. Rep. 493; Stewart v. Flint (Vt.), 8 Atl. Rep. 801. But see Samuel v. Marshall, 3 Leigh (Va.), 567; Smith v. Elliot, 1 P. & H. (Va.) 307.

[1] Harding v. Handy, 11 Wheat. 103; Anthony v. Hutchings, 10 R. I. 165; Mormon v. Mormon, 47 Iowa, 121; Allore v. Jewell, 94 U. S. 506; O'Conner v. Rempt, 29 N. J. Eq. 156; Morrison v. Morrison, 27 Gratt. 190; McDaniel v. McCoy (Mich.), 36 N. W. Rep. 84; Baldrick v. Garvey, 66 Iowa, 14. But see Chew v. Bank of Baltimore, 14 Md. 318; Riggin v. Green, 80 N. C. 236. Where transaction is unreasonable it is decisive as to question of capacity. Bussey v. Gross (Ky.), 7 S. W. Rep. 150. Mere impairment by age, of mental powers does not necessarily incapacitate from making deed; nor does it show undue influence. Kimball v. Cuddy, 117 Ill. 213. Courts will not set aside contract of persons of unsound mind, where such contract is fair and reasonable, when parties entered into it in ordinary course of business, and where they cannot be placed *in statu quo*. Abbott v. Creal, 56 Iowa, 175. Cannot be impeached on ground that grantor was a monomaniac on subject of religion. Burgess v. Pollock, 53 Iowa, 273. And see also Jones v. Hughes, 15 Abb. N. Cas. 141.

[2] Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236; Somers v. Pumphrey, 24 Ind. 231; Cates v. Woodson, 2 Dana (Ky.), 452; Harvey v. Hobson, 53 Me. 451; 2 Bl. Com. 291; Ingraham v. Baldwin, 5 Seld. 45; Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Met. 415; Jackson v. Gumaer, 2 Cow. 552; Crouse v. Holman, 19 Ind. 30; Freed v. Brown, 55 Ind. 310; Riggin v. Green, 80 N. C. 236; Conrath v. Kienly, 83 Ind. 18; Bunham v. Kidwell, 113 Ill. 425. But Van Deusen v. Sweet, 57 N. Y. 383; Farley v. Parker, 6 Oreg. 105; Evans v. Horan, 52 Md. 602.

[3] Wait v. Maxwell, 5 Pick. 217; Fitzhugh v. Wilcox, 12 Barb. 235. Guardianship is conclusive as to the disability of the ward. Wadsworth v. Sherman, 14 Barb. 169; Leonard v. Leonard, 14 Pick. 280; White v. Palmer, 4 Mass. 147; McDonald v. Morton, 1 Mass. 543.

a married woman, or *feme covert*, was not merely voidable, but absolutely void.[1] The English statute of 3 and 4 Wm. IV., ch. 75, allowed a married woman to dispose of her lands by deed, with the concurrence of her husband, but the deed had to be acknowledged before the proper person by whom she was examined apart from her husband, to ascertain if her consent to the deed was voluntary. This statute establishes a mode of conveyance by married women in England which has long been employed in this country. In most of the States similar statutes have been enacted, limiting, in a greater or less degree, the capacity of married women to alienate their lands. Indeed, it may be stated as a general proposition, that the deed of a married woman, unless joined by her husband, or unless authorized by statute, is void.[2] But the tendency of legislation in this country has been to clothe women with more or less power to convey real property owned by them, and in many of the States they may alienate by deed such land as has been conveyed to them for their own use, separate and apart from their husbands, or what is called "separate estates," as if they were sole and unmarried.[3] In some of

[1] 2 Bl. Com. 293.

[2] Shep. Touch. 56; Concord Bank v. Bellis, 10 Cush. 277; Lefever v. Murdock, Wright (Ohio), 205; Bool v. Mix, 17 Wend. 119; Lowell v. Daniels, 2 Gray, 161; Hogan v. Hogan, 89 Ill. 427; Fowler v. Shearer, 7 Mass. 21; Gillespie v. Bailey, 12 W. Va. 70; Cope v. Meeks, 3 Head, 388; Dow v. Jewell, 18 N. H. 355; Rake v. Lawshee, 24 N. J. L. 613; Moore v. Rake, 26 N. J. L. 574; Trimmer v. Heagy, 16 Pa. St. 484; Peck v. Ward, 18 Pa. St. 506; Baxter v. Bodkin, 25 Ind. 172; Davis v. Andrews, 30 Vt. 681; Bressler v. Kent, 61 Ill. 426; Huff v. Price 50 Mo. 228. Under the Illinois act of 1861, a married woman cannot convey to her husband, since the act requires him to join in her conveyance. Brent v. Yeaton, 101 Ill. 242. The provisions of the statute must be strictly complied with. Ellet v. Richardson, 7 Cent. L. J. 146; Knight v. Thayer, *Id.* 477; Buchanan v. Hazzard, 95 Pa. St. 240.

[3] Bressler v. Kent, 61 Ill. 426; Huff v. Price, 50 Mo. 228; Hogan v. Hogan, 8 Cent. L. J. 316; Cushman v. Henry, 75 N. Y. 103; Foreman v. Hoster, 94 Pa. St. 418; Booker v. Wingo (S. C.), 7 S. E. Rep. 49; Edwards v. Schoeneman, 104 Ill. 278; Clark v. Clark (Oreg.), 18 Pac. Rep. 1; Baldwin v. Flagg, 36 N. J. Eq. 48; Frazer v. Clifford, 94 Ind. 482; Ewing's Appeal, 101 Pa. St. 371. But by statute in many of the States

the States the statutes go further than in others, and allow married women to convey lands without the concurrence of their husbands and in the same manner as if they were unmarried.[1] It has been held that the infancy of a married woman will make her deed voidable, notwithstanding its execution in the form prescribed by statute.[2]

§ 28. **Duress.**—A deed, made under duress of imprisonment or fear from threats of personal violence, is voidable but not void.[3] To constitute such duress as will be suffi-

no married woman can convey or encumber her separate estate unless the husband join in the deed. Stimson's Amer. St., p. 742, § 6500; Martin v. Colburn, 88 Mo. 229; Schley v. Pullman Car Co., 120 U. S. 575; Gregg v. Owens (Minn.), 33 N. W. Rep. 216; Cook v. Walling (Ind.) 19 N. E. Rep. 532. Or give consent. Rooney v. Michael (Ala.), 3 South. Rep. 421; Sewell v. Haymaker, 8 S. C. Rep. 1348. And see Dugan v. Corn, 82 Ky. 206.

[1] Watson v. Thurber, 11 Mich. 457; Brimmet v. Weaver, 2 Oreg. 168; Hale v. Christy, 8 Neb. 264; Morris v. Harris, 9 Gill (Md.), 19; Allen v. Hooper, 50 Me. 371; Willard v. Dow, 54 Vt. 188; Roberts v. Wilcoxen, 36 Ark. 355. Under Rev. St. Me. 1871, ch. 61, giving a married woman power to convey land in her own right without assent or joinder of her husband, a married woman has the power to convey direct to her husband. Savage v. Lange (Me.), 15 Atl. Rep. 43. And see as to effect under Ohio and Virginia statutes. Sewell v. Haymaker, 8 S. C. Rep. 1348. In many of the States wife can mortgage her separate estate to pay her husband's debts. Petty v. Grisard, 45 Ark. 127; Christian v. Keen, 80 Va. 369; Hagenbuch v. Phillips, 112 Pa. St. 284. And see Wallace v. Craig (S. C.), 4 S. E. Rep. 74. But *contra:* Keller v. Orr, 106 Ind. 406. Under laws New York 1860, ch. 90, grantee of married women, without consent of husband in writing takes valid title against all the world, except the husband. *In re* Est. Bedlesheim, 1 N. Y. Supplement, 276. A married woman, resident in Kentucky and having separate property in the State, may authorize her husband by power of attorney to convey it, the statute prohibiting such powers applying only to their general and not separate estate. Chrismas v. Hahm (Ky.), 9 S. W. Rep. 270. And see Clements v. Ewing (Tex.), 9 S. W. Rep. 312.

[2] Bool v. Mix, 17 Wend. 119; Youse v. Norcoms, 12 Mo. 549; Sanford v. McLean, 3 Paige, 117; Hoyt v. Swar, 53 Ill. 134. But see Caho v. Endress, 8 Cent. L. J. 178; Wilson v. Branch, 77 Va. 65; Richardson v. Pate, 93 Ind. 423; Losey v. Bond, 94 Ind. 67; Ellis v. Alford, 64 Miss. 8.

[3] Davis v. Fox, 59 Mo. 125; Baker v. Morton, 12 Wall. 150; Cook v. Moore, 39 Tex. 255; Worcester v. Eaton, 13 Mass. 371; Deputy v. Staplcford, 19 Cal. 302; Brown v. Peck, 2 Wis. 261; Bogle v. Hammons, 2 Heisk. 136. Proof must be clear and convincing. Northwestern Mut.

cient to avoid a deed, there must be such violence or threats as are calculated to operate on a person of ordinary firmness, and inspire a just fear of the loss of life or limb, or personal liberty.[1] If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, as if it be a just and legal imprisonment, or threats of any measure authorized by law, it will not avoid a deed.[2] But where the proceedings at law are a mere pretext, the instrument may be avoided.[3] Where there is no other motive, besides the violence or threats, for making the deed, a less degree of danger will be sufficient to invalidate it.[4] And the age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, are also to be taken into consideration.[5]

§ 29. **Undue Influence.**—Closely allied to the subject of the incapacity of an imbecile, or one under duress to make a deed, is that of undue influence, which, according to the circumstances of each case, will render a deed voidable,[6] when made by one with feeble mind, and so situated as to be improperly and illegally influenced. Equity considers such an act a fraud and will set it aside, when duress or undue influence over the grantor are so clearly shown as to make it

Life Ins. Co. v. Nelson, 103 U. S. 544. But void by statute in some States. Stimson's Amer. St., p. 746, § 6509.

[1] Barrett v. French, 1 Conn. 354; United States v. Huckabee, 16 Wall. 432; Williams v. Williams, 63 Md. 371; Koconrek v. Mavak, 54 Tex. 201; Adams v. Stringer, 78 Ind. 175; Bouldin v. Reynolds, 58 Md. 491; Bromer v. Callender, 105 Ill. 88; Nevada Bank v. Bryan, 62 Iowa, 42. Effect upon innocent purchaser. Rogers v. Adams, 66 Ala. 600. And see Line v. Blizzard, 70 Ind. 23.

[2] Harris v. Tyson, 24 Pa. St. 347; Crowell v. Gleason, 10 Me. 325; Norris' Peaks' Ev. 440; Davis v. Luster, 64 Mo. 43; Wilcox v. Howland, 23 Pick. 167; Mut. Life Ins. Co. v. Meekira, 85 N. Y. 64; Buck v. Axt, 85 Ind. 512. But see Harris v. Carmody, 131 Mass. 51.

[3] 1 Bl. Com. 136.

[4] Norris' Peaks' Ev. 1853.

[5] Bane v. Detrick, 52 Ill. 19.

[6] Not void. Evans v. Horan, 52 Md. 602.

appear that the grantor is not a free agent.[1] When relations of confidence, as trustee and beneficiary, attorney and client, parent and child, guardian and ward, physician and patient, nurse and invalid, exist, less evidence is required to show undue influence in the making of a deed.[2] But it has been held that mere improper influence, not amounting to fraud, will not vitiate a deed when the grantor, though of feeble mind, acted with the knowledge and against the objections of competent friends.[3] And neither weakness of mind nor old age is of itself sufficient ground to invalidate an instrument. To have that effect there must be some fraud in the transaction, some unlawful coercion, physical or moral.[4]

§ 30. **Intoxication.**—It has been held that a deed may be avoided for the intoxication of the maker at the time of executing it, though the party claiming under the deed had no part in causing the drunkenness.[5] But it would seem to be the correct rule that, if no undue advantage is taken in procuring the deed, intoxication of itself will not avoid it.[6]

[1] Howe v. Howe, 99 Mass. 88; Turner v. Turner, 44 Mo. 535; Taylor v. Taylor, 8 How. 183; Fuller v. Fuller, 40 Ala. 301; Amis v. Satterfield, 5 Ired. Eq. 173; Bowles v. Watham, 54 Mo. 261; Anthony v. Hutchins, 10 R. I. 165; Mead v. Coombs, 26 N. J. Eq. 173; Allore v. Jewell, 94 U. S. 506; Yard v. Yard, 27 N. J. Eq. 114.

[2] Bayliss v. Williams, 6 Coldw. (Tenn.) 440; Peebles v. Horton, 64 N. C. 374; Futrill v. Futrill, 5 Jones (N. C.), Eq. 61; Case v. Case, 26 Mich. 484. But see Jenkins v. Pye, 12 Pet. 241; Millican v. Millican, 24 Tex. 426; Crowe v. Peters, 63 Mo. 429.

[3] Corbit v. Smith, 7 Iowa, 60; Guest v. Beeson, 2 Houst. (Del.) 247; Hallocher v Hallocher, 62 Mo. 267. Party seeking to set aside the deed must show that the transaction was affected by the grantor's derangement. Blakely v. Blakely, 33 N. J. Eq. 503.

[4] Davis v. Colver, 13 How. Pr. 62; Suttles v. Hay, 6 Ired. (N. C.) Eq. 124.

[5] Reinicker v. Smith, 2 Har. & J. 421; Donelson v. Posey, 13 Ala. 752; Eaton v. Perry, 29 Mo. 96; Dulaney v. Green, 4 Harr. 285; Warnock v. Campbell, 25 N. J. Eq. 485. Intoxication must be such as to deprive maker of understanding. Johnson v. Phifer, 6 Neb. 401. See also Freeman v. Staats, 8 N. J. Eq. 811; Woods v. Pindall, Wright (Ohio), 507; Van Wyck v. Brasher, 81 N. Y. 260. In Georgia and Louisiana, by statute, drunkards are incapable of entering into a valid contract. Stimson's Amer. St., p. 452, § 4110.

[6] Belcher v. Belcher, 10 Yerg. 121; Morris v. Nixon, 7 Humph. 579; Wiley v. Ewalt, 66 Ill. 26; O'Connor v. Rempt, 29 N. J. Eq. 156.

§ 31. **Joint Tenants and Tenants in Common** are, in some degree, limited in their capacity to convey. In general, one cannot convey his interest in any particular part of the common estate without the consent of his co-tenant. Such a conveyance, however, would be void only as against the co-tenant; as to all other persons it would be valid and effectual.[1] It has been held that, although one tenant in common cannot convey, by metes and bounds, a distinct portion of the whole tract held in common with others, so as to prejudice his co-tenants or assignees, yet where several persons are tenants in common of separate and distinct parcels of land, one of them may convey all his undivided interest in the whole of any one of the distinct parcels, and his deed will be valid and effectual against his co-tenants.[2] It may be added that one of several trustees cannot, in general, convey a separate or aliquot part of the trust estate.[3] Nor does the general implied power of a partner extend to binding the firm by instrument under seal.[4] A deed executed

[1] Lamb v. Wakefield, 1 Sawyer, 252; Whitton v. Whitton, 38 N. H. 127; Good v. Coombs, 28 Tex. 51; NeKey v. Welch, 22 Tex. 390; Campau v. Godfrey, 18 Mich. 27; Butler v. Roys, 25 Mich. 53; Blossom v. Brightman, 21 Pick. 284; Phillips v. Tudor, 10 Gray, 78; Griswold v. Johnson, 5 Conn. 363; Duncan v. Sylvester, 24 Me. 482; Jewett v. Stockton, 3 Yerg. 492; March v. Huyter, 50 Tex. 243; Ballow v. Hale, 47 N. H. 347; Boston v. Condit, 19 N. J. Eq. 394; Gates v. Salmon, 35 Cal. 576; Bigelow v. Topliff, 25 Vt. 273; Sneed v. Warning, 2 B. Mon. 522. See Apgar v. Christopher, 33 Fed. Rep. 201. As to one co-tenant making lease. Whyler v. Van Tiger (Cal.), 14 Pac. Rep. 846.

[2] Primm v. Walker, 38 Mo. 94. And see Bell v. Adams, 81 N. C. 118; Ruppe v. Stemborch, 18 Mich. 465. In Maryland a tenant in common may dispose of his interest in any particular separate portion of real estate which has descended to him in common, under the act to direct descents. Reinicker v. Smith, 2 Har. & J. 421. A tenant, in common who assumes to convey the entire interest of both conveys only his interest and purchaser becomes a tenant in common with the other. Sims v. Daws (Ind.), 15 N. E. Rep. 217.

[3] Chapin v. First Universalist Soc., 8 Gray, 583; Brennan v. Wilson, 71 N. Y. 502.

[4] Harrison v. Jackson, 7 Term. 207; Clement v. Brush, 3 Johns. Cas. 180; Van Deusen v. Blum, 18 Pick. 229; Posey v. Bullitt, 1 Blackf. 99; Trimble v. Coons, 2 A. K. Marsh. (Ky.) 375; Cummins v. Cassily, 5 B. Mon. 71; Nunnely v. Doherty, 1 Yerg. 26; McNaughten v. Partridge, 11

by one of the partners in the name of the firm will only affect his own interest and will not pass the interest of his partner.[1] Yet express authority will give effect to such deed, and it seems that this may be either by previous assent or subsequent ratification.[2] But this assent or ratification, it is held, must be by an instrument of as high a nature as the deed itself,[3] though the tendency in some of the States is to regard a parol ratification as sufficient.[4] And some of the cases go to the extent that this need not be express and special, but may be implied from the conduct and course of dealing by the firm.[5]

§ 32. **Deed from Husband to Wife.**—By the rules of the common law, as distinguished from equity, the husband or wife cannot convey land directly, one to the other.[6] But

Ohio, 223; Doe v. Tupper, 4 Smed. & M. 261; Snodgrass Appeal, 1 Harris, 471; Morris v. Jones, 4 Harr. 428; Little v. Hazzard, 5 Harr. 292; Moline Wagon Co. v. Rummell, 14 Fed. Rep. 155; Herzog v. Sawyer, 61 Md. 344.

[1] Brooks v. Sullivan, 32 Wis. 444; Thompson v. Bowman, 6 Wall. 316, Anderson v. Tompkins, 1 Brock. 456; Jackson v. Stanford, 19 Ga. 14; Layton v. Hastings, 2 Harr. 147; Printup v. Turner, 65 Ga. 71; Brunson v. Morgan, 76 Ala. 593. But *contra*, of partnership formed for the purpose of buying and selling land. Young v. Wheeler, 34 Fed. Rep. 98; Smith v. Bunham, 3 Sum. 435.

[2] Gunter v. Williams, 40 Ala. 561; Gibson v. Warden, 14 Wall. 244; Baldwin v. Richardson, 33 Tex. 16; 1 Am. Lead. Cas. 592; Shirley v. Fearne, 33 Miss. 653; Ely v. Hair, 16 B. Mon. 230; Haynes v. Seachrest, 13 Iowa, 455; Pike v. Bacon, 21 Me. 280; Lowery v. Drew, 18 Tex. 786. But see Little v. Hazard, 5 Harr. 340; Chittenden v. Germ. Amer. Bank, 27 Minn. 143.

[3] Story Part., §§ 119, 121; Gow. Part. 75, 76; Henry County v. Gates, 26 Mo. 315; Snyder v. May, 19 Pa. St. 235.

[4] Cady v. Shepherd, 11 Pick. 400; Bond v. Aitkin, 6 Watts & S. 165; Haynes v. Seachrest, 13 Iowa, 455; Gunter v. Williams, 40 Ala. 561; 1 Am. Lead. Cas. 611; Grady v. Robinson, 28 Ala. 289; Herzog v. Sawyer, 61 Md. 344.

[5] Gwinn v. Rooker, 24 Me. 292; Pike v. Bacon, 21 Me. 280; Davis v. Burton, 3 Scam. 41; Witter v. McNeil, *Id.* 433; Hatch v. Crawford, 2 Porter, 54. See Kelley v. Pike, 5 Cush. 484; 1 Am. Lead. Cas. 611; Catlin v. Gilden, 3 Ala. 536; Haynes v. Seachrest, 13 Iowa, 455.

[6] Underhill v. Morgan, 33 Conn. 107; Martin v. Martin, 1 Greenleaf, 394; Voorhees v. Presb. Ch., 17 Barb. 103; Rowe v. Hamilton, 3 Greenl. 63; Johnson v. Rogers, 35 Hun, 267.

courts of equity will give effect to such deeds, if not in fraud of creditors, when made through the intervention of a trustee,[1] or by means of the Statute of Uses, in the form of a conveyance to the use of the husband or wife,[2] or a covenant to stand seized.[3] In some of the States, however, a husband can convey land directly to his wife, without the necessity of a trustee,[4] and it will be sustained in equity if founded on a meritorious consideration,[5] and distinctly intended for her separate use,[6] and if not in fraud of creditors.[7]

§ 33. **The Capacity of a Grantee** is much less restricted than that of a grantor. Infants, married women and persons of non-sane mind may, as a general thing, take as grantees.[8] Deeds or leases made to an infant are, of course,

[1] Spencer v. Godwin, 30 Ala. 355; Jewell v. Porter, 31 N. H. 34; Abbott v. Hurd, 7 Blackf. 510; Frissel v. Rozier, 19 Mo. 448; Fowler v. Trebein, 16 Ohio St., 493; Simmons v. Thomas, 43 Miss. 31; Barnum v. Farthing, 40 How. (Pr.) 25; Aultman v. Obermeyer, 6 Neb. 260; Loomis v. Brush, 36 Mich. 40; Bancroft v. Curtis, 108 Mass. 47. And see Clark v. McGeihan, 25 N. J. Eq. 423; Story v. Story, 41 N. J. Eq. 370; Harden v. Darwin, 66 Ala. 55; Loeb v. McCullough, 78 Ala. 533; Gaston v. Weir (Ala.), 4 South. Rep. 258.

[2] Pennsylvania Salt Co. v. Neel, 54 Pa. St. 9; Roper Hus. & Wife, 59.

[3] Thatcher v. Omans, 3 Pick. 521.

[4] Burdeno v. Amperse, 14 Mich. 91; Hoffman v. Stiger, 28 Iowa, 308; Wilder v. Brooks, 10 Mich. 50; Johnson v. Stillings, 35 Me. 427; Allen v. Hooper, 50 Me. 372; Winans v. Peebles, 31 Barb. 371; Goodlet v. Hansell, *Id.* 151; Sassen v. McWilliams, 73 Ga. 678; Furrow v. Athey, 21 Neb. 671; Brown v. Brown, 36 N. W. Rep. 275; Woodsworth v. Tanner (Mo.), 7 S. W. Rep. 104. And see Bray v. Clapp (Me.), 13 Atl. Rep. 909. The conveyance by husband to wife direct without intervention of trustee gives her only an equitable estate. Powe v. McLead, 76 Ala. 418; Washburn v. Gardner, *Id.* 597; Smith v. Leiberling, 35 Fed. Rep. 677. But *contra*, Winans v. Peebles, 32 N. Y. 423; White v. Wagner, 25 N. Y. 328.

[5] Hunt v. Johnson, 62 Ill. 22; Dale v. Lincoln, 44 N. Y. 27; Watson v. Riskamire, 45 Iowa, 231.

[6] Sims v. Rickets, 35 Ind. 181; Thompson v. Mills, 39 Ind. 520; Mays v. Price (Mo.), 8 S. W. Rep. 731. Though not so expressed in the deed. Smith v. Leiberling, 35 Fed. Rep. 677.

[7] Brookbank v. Kennard, 41 Ind. 339; Annin v. Annin, 24 N. J. Eq. 185; Sherman v. Hogland, 54 Ind. 578.

[8] 1 Wood Conv. 165, 168; Co. Litt. 2*b*; Perkins, § 51.

voidable.[1] So, also, of those made to one *non compos mentis*.[2] At common law a deed might be made to a married woman, subject, however, to the dissent of her husband during his life, or her disaffirmance after his death.[3] In most of the States, however, by statute or by rulings of courts of equity, lands may be conveyed to a wife free from the control of her husband, either directly or by means of a trustee, for her sole and separate use.[4] But a deed to a *feme covert* not describing her as a married woman, nor purporting to be for her sole and separate use, is *prima facie* a conveyance to the husband and wife in common,[5] and the burden of proof is on the wife to show that it is

[1] Baxter v. Bush, 29 Vt. 465; Griffith v. Schwenderman, 27 Mo. 412.

[2] Bishop on Contracts, § 296.

[3] 2 Bl. Com. 292; 2 Kent's Com. 150; Scanlan v. Wright, 13 Pick. 523; 1 Bishop on Married Women, § 35; Baxter v. Smith, 6 Binn. (Pa.) 427.

[4] Meyer v. Kinzer, 12 Cal. 251; Commonwealth v. Williams, 7 Gray, 337; Ayer v. Ayer, 16 Pick. 331; Nightingale v. Hidden, 7 R. I. 128; Fisk v. Stubbs, 30 Ala. 335; Bayer v. Cockerill, 3 Kan. 282; Pooley v. Webb, 3 Coldw. (Tenn.) 599; Houston v. Carl, 8 Tex. 240; Vance v. Nogle, 70 Pa. St. 176; Smalley v. Lawrence, 9 Rob. (La.) 211; Gamber v. Gamber, 6 Harris (Pa.), 363; Richmond v. Tibbles, 26 Iowa, 474; Uhrig v. Horstman, 8 Bush (Ky.), 172; Whitehead v. Arline, 43 Ga. 221; Pront v. Roby, 15 Wall. 471; Lippincott v. Mitchell, 94 U. S. 767; Burnley v. Thomas, 63 Mo. 390; McVey v. Green Bay R. R. Co., 42 Wis. 532; Perdue v. Montgomery, etc. Assoc., 79 Ala. 478; Kellogg v. Kellogg, 63 Miss. 631; Cardwell v. Perry, 82 Ky. 129; Carswell v. Lovett (Ga.), 4 S. E. Rep. 866; Lathrop v. White (Ga.), 6 S. E. Rep. 834.

[5] The question has arisen and authorities are conflicting as to whether a deed to husband and wife conveys to them in common or in entirety, by which, upon the death of one, the survivor takes the entire estate, and whether the statutes relating to married women have changed the rule with reference to the right of the survivor. In the following cases it is held that they take by entirety, with right of survivorship: Baker v. Stewart, 19 Pac. Rep. 904; Smith v. Smith, 30 Ala. 642; Myers v. Reed, 17 Fed. Rep. 401; Hall v. Stephens, 65 Mo. 670; Robinson v. Eagle, 29 Ark. 202; Pray v. Stebbins, 141 Mass. 219; McDuff v. Beauchamp, 50 Miss. 531; Jacobs v. Miller, 50 Mich. 119; Diver v. Diver, 56 Penn. St. 106; Bertles v. Noonan, 92 N. Y. 152. See 28 Cent. L. J. 107. But *contra:* Cooper v. Cooper, 76 Ill. 57; Hoffman v. Stigers, 28 Iowa, 302; Clark v. Clark, 56 N. H. 105. Before the enactment of Massachusetts statute 1885, ch. 237, a conveyance of land in fee to husband and wife gave them an estate by entireties, as at common law. Pray v. Stebbins, 141 Mass. 219.

her separate property, acquired[1] in a specified manner and purchased with her own money.[2] An alien may purchase and hold land against the whole world, except the sovereignty,[3] though he cannot, in general, acquire title by descent, or by other mere operation of law. And if he purchases land he may be divested of the fee upon an inquest of *office found;* but until this is done he may sell, convey or devise the land, and pass a good title to the same.[4] In many of the States the disability of aliens is entirely removed by statute.[5]

By the English statutes against mortmain, corporations are prohibited from holding land without special authority.[6] Similar statutes were enacted in Pennsylvania.[7] But in other States this statute is believed not to be in force, and corporations may hold real estate for purposes not foreign to their institution.[8] It may be added that by the general

[1] Adams v. Knowlton, 22 Cal. 283; Whitehead v. Arline, 43 Ga. 221; Merrill v. Bullock, 105 Mass. 486; Reeves v. Webster, 71 Ill. 307. And see Devechaud v. Berrey, 48 Ala. 591; Hoyt v. Parks, 39 Conn. 357; Hussey v. Castle, 41 Cal. 239. No specific words necessary to the creation of separate estate if the intention clearly appears. Magill v. Mer. Trust Co., 81 Ky. 129; Duke v. Duke, *Id.* 308; Robinson v. Randolph, 21 Fla. 629.

[2] Pettit v. Fritz, 33 Pa. St. 120; Commonwealth v. Williams, 7 Gray, 337. And see Nightingale v. Hidden, 7 R. I. 131; Woodford v. Stephens, 51 Mo. 443. Upon proof of a conveyance of land to the wife from a stranger, without any evidence as to the person by whom the consideration was paid, it must be held that it is her separate estate. Lyon v. Green Bay R. R. Co., 42 Wis. 548. Mitchell v. Colglazier, 106 Ind. 464. And see Pemberton v. Pollard, 18 Neb. 435; McComb v. Spangler (Cal.), 12 Pac. Rep. 347.

[3] 2 Bl Com. 293; Shep. Touch. 56; 1 Wood Conv. 138. The fact that an alien owns stock in a corporation which has acquired title to real estate does not disturb the title of the corporation to the real estate. Carver Mer. Co. v. Hulme (Mont.), 19 Pac. Rep. 213.

[4] 2 Bl. Com. 293; Shep. Touch. 56.

[5] Stimson's Amer. Stat., §§ 102, 6013.

[6] 2 Kent's Com. 282.

[7] Purd. Dig. 147. As to extent of this doctrine in Pennsylvania see Church v. Remington, 1 Watts, 218.

[8] Angell & Ames on Corp. (10th ed.) p. 118; Patten v. Thornton, 7 R. I. 252. Michigan: Such real estate as is actually occupied by the corporation in the exercise of its franchise. In Missouri, California, Louis-

comity which obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to transact business and acquire, hold and transfer property in another.[1] It has been held that if the policy of the latter State restricts this right it must be expressed in some affirmative way, and cannot be inferred from the fact that the legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law.[2] And when a corporation is authorized to hold real property, necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation, and is no concern of third parties.[3] One State has the constitutional right to prescribe the terms on which corporations organized in other States of the Union may transact business within it.[4]

§ 34. **The Parties, Grantor and Grantee Must be in Esse** at the time of the conveyance.[5] A deed of a present estate to a party not then living would be void.[6] If there is any reasonable doubt of either of the parties being *in esse* at the time of the delivery of the deed it must be affirma-

iana such as is necessary and proper for carrying on its legitimate business. Stimson's Amer. Stat., § 456. But see Carroll v. East St. Louis, 67 Ill. 568.

[1] Farmers' Loan Co. v. McKinney, 6 McLean, 1; Whitman Mining Co. v. Baker, 3 Neb. 386; Lumbard v. Aldrich, 8 N. H. 31; State v. Boston, 25 Vt. 433; Cowell v. Colorado Springs Co., 100 U. S. 55. And see Starkweather v. American Bible Soc., 72 Ill. 50; U. S. Trust Co. v. Lee, 73 Ill. 142. The right of corporations to hold property is determined by the law of the government in which it is doing business and in which it acquires the property. Tarpey v. Deseret Salt Co. (Utah), 17 Pac. Rep. 631.

[2] Cowell v. Colorado Springs Co., 100 U. S. 55.

[3] *Ibid;* Natoma Mining Co. v. Clarkin, 14 Cal. 552; East Norway, etc. Church v. Froislie (Minn.), 35 N. W. Rep. 260; Russell v. T. & P. R. R. (Tex.), 5 S. W. Rep. 686.

[4] Farmers' Ins. Co. v. Harrah, 47 Ind. 236; Home Ins. Co. v. Davis, 29 Mich. 238.

[5] So provided by statute in some of the States. Stimson's Amer. Stat., § 1412.

[6] Hunter v. Watson, 12 Cal. 363; Miller v. Chittenden, 2 Iowa, 368.

tively shown in order to give it effect.[1] It may be remarked that this principle does not apply to remainder-men where there is a party existing to take the immediate estate. It is limited also to that of which livery may be made; it does not extend to incorporeal hereditaments.[2]

ARTICLE V.

FRAUDULENT CONVEYANCES.

SECTION.

36. When a conveyance will be deemed fraudulent.
37. Voluntary conveyances.
38. Deeds obtained by fraud of the grantee.
39. Conveyances void for other causes.

§ 36. **When a Conveyance will be Deemed Fraudulent.** —We have previously observed that all persons except those whom the law places under some particular disability have absolute dominion over their property. They may, within the limits prescribed by law, make whatever disposition of it they please. But in so doing they will not be permitted to interfere with the existing rights of others.[3] Thus, where a creditor takes no specific security from his debtor, he trusts him on the general credit of his property, and a confidence that he will not diminish it to his prejudice.[4] A

[1] Hulick v. Scovil, 4 Ill. 191. As to how far grants to charitable uses form exceptions to this rule, see Miller v. Chittenden, 2 Iowa, 368; Potter v. Chapin, 6 Paige, 649; Vidal v. Gerard's Ex., 2 How. 128; Brown v. Manning, 6 Ohio, 303. A grant to a corporation which has never been created or organized would be void. Harriman v. Sutham, 16 Ind. 190; Jones v. Cincinnati Type Foundry, 14 *Id.* 89; Russell v. Topping, 5 McLean, 202.

[2] Huss v. Stephens, 51 Pa. St. 282.

[3] Sexton v. Wheaton, 8 Wheat. 242. There cannot be, as against creditors, a fraudulent conveyance of that which they could not reach—a homestead for instance. Stanley v. Snyder, 43 Ark. 429.

[4] Eppes v. Randolph, 2 Call, 183.

violation of this confidence is a fraud upon such creditor, and whoever receives a conveyance with notice of the fraud is assisting the debtor to cheat his creditor, which the law never tolerates.[1] Accordingly, conveyances made to the end, purpose and intent to delay, hinder or defraud creditors are, by the policy of the law or by statute, rendered void, as to such creditors.[2] The fraud which invalidates the conveyance consists in the intent,[3] acted upon,[4] to prevent creditors from recovering their just debts. And when a debtor places his property beyond the reach of legal process, for the purpose of hindering or delaying his creditors, this is a legal fraud, though he may intend ultimately to pay them.[5] Although the grantor makes the conveyance with a fraudulent intent, if it be for a valuable consideration, it is valid as to innocent purchasers without notice of such intent.[6] To make a conveyance fraudulent as to credit-

[1] Codogan v. Kennett, 1 Cowp. 432.

[2] Robinson v. Holt, 39 N. H. 557; Foley v. Bitter, 34 Md. 646; Prout v. Vaughn, 52 Vt. 451; Strauss v. Abrahams, 32 Fed. Rep. 310. The rule applies as to existing creditors. Johnson v. Skaggs (Ky.), 2 S. W. Rep. 493. So long as a debtor remains solvent no sale can be held to have been made in contemplation of insolvency unless actual fraud be shown. Griffith v. Cox, 79 Ky. 562. Intent to hinder and delay is sufficient. McCreary v. Skinner (Iowa), 38 N. W. Rep. 676.

[3] Rogers v. Evans, 3 Ind. 574; Reed v. Carl, 3 Smed. & M. 74; Chandler v. Van Roeder, 24 How. 224; Alabama Ins. Co. v. Pettway, 24 Ala. 544; Splawn v. Martin, 17 Ark. 146; Worthy v. Brady, 91 N. C. 265. In Michigan, the question of intent under Comp. St., § 6206, is one of fact and not of law. Norris v. McCanna, 29 Fed. Rep. 757. The intent must be to prevent the whole or a part of his property to be applied to the payment of his debts. It is not enough that he intended to secure one creditor at the expense of another. Spear v. Clafflin, 76 Va. 299.

[4] Bunn v. Ahl. 29 Pa St. 387.

[5] Wheelden v. Wilson, 44 Me. 1; Boreland v. Mayo, 8 Ala. 104; McLean v. Lafayette Bank, 3 McLean, 587; Stovall v. Farmers' Bank, 8 Smed. & N. 305; Kimball v. Thompson, 4 Cush. 441. Whether a mortgage given to secure future advances as well as an existing debt is fraudulent as to other creditors is a question of fact. Wood v. Franks, 67 Cal. 32.

[6] Moshier v. Knox College, 32 Ill. 155; Paige v. O'Neil, 12 Cal. 483; Bridges v. Eggleston, 14 Mass. 250; Wright v. Howell, 35 Iowa, 292; Fletcher v. Peck, 6 Cranch, 133; Bean v. Smith, 2 Mason, 274; Trott v. Warren, 11 Me. 227; Florence S. M. Co. v. Zeigler, 58 Ala. 222; Shultz

ors, the fraudulent purpose must be known to and participated in by the grantee.[1] And if the grantee is shown to have participated in the purpose to defraud or delay, the conveyance will be void, though a full and valuable consideration may have been paid.[2] It is likewise to be remembered that neither inadequacy of consideration nor the fact of indebtedness, nor even insolvency is, of itself, sufficient to set aside a conveyance;[3] though taken in con-

v. Morgan, 27 La. An. 616; Jackson v. Henry, 10 Johns. 186; Galbreath v. Cook, 30 Ark. 417; Mowrey v. Walsh, 8 Cow. 238; Campbell v. Whitson, 68 Ill. 240; Mellen v. Ames, 39 Iowa, 283; Jewett v. Cook, 81 Ill. 260; Tredwell v. Graham, 88 N. C. 208; Kohn v. Clement, 58 Iowa, 589; Ladnier v. Ladnier (Miss.), 1 South. Rep. 492; Schroeder v. Walsh (Ill.), 11 N. E. Rep. 70.

[1] Splawn v. Martin, 17 Ark. 146; Byrne v. Becker, 42 Mo. 264; Hessing v. McCloskey, 37 Ill. 342; Gridley v. Bingham, 51 Ill. 153; Carpenter v. Muren, 12 Barb. 300; Waterbury v. Sturtevant, 18 Wend. 353; State v. Keeler, 19 Mo. 548; Weisiger v. Chisholm, 28 Tex. 780; Miller v. Kirby, 74 Ill. 242; Hedman v. Anderson, 6 Neb. 392; Marshall v. Croom, 60 Ala. 121; Curtis v. Valiton, 3 Mont. 153; Roe v. Moore, 35 N. J. Eq. 526; Farley v. Carpenter, 27 Hun, 359; Moline Wagon Co. v. Rummel, 14 Fed. Rep. 155; Hurley v. Taylor, 78 Mo. 238; Horbach v. Hill, 112 U. S. 144; Beasley v. Bray (N. C.), 3 S. E. Rep. 497.

[2] Wadsworth v. Williams, 100 Mass. 131; Wood v. Chambers, 20 Tex. 247; Crow v. Beardsley, 68 Mo. 435; Schmidt v. Opie, 33 N. J. Eq. 138; Williamson v. Wachenheim, 58 Iowa, 277; McKinnon v. Reliance Lumber Co., 63 Tex. 30. Also if grantee simply had notice of such intent. Goshorn v. Snodgrass, 17 W. Va. 717; Hedrick v. Walker, *Id.* 916; Bowyer v. Martin, 27 W. Va. 442. But mere knowledge of grantee that the debtor was in failing circumstances not sufficient. Rockwood Manuf. Co. v. Masters (Iowa), 39 N. W. Rep. 219. But *contra:* Holmes v. Broadswood, 82 Mo. 610; Baughman v. Penn, 33 Kan. 504; Leffel v. Schermerhorn, 13 Neb. 342; Sexton v. Anderson (Mo.), 8 S. W. Rep. 564.

[3] Alexander v. Todd, 1 Bond, 175; Frank v. Peters, 9 Ind. 344; Jenkins v. Einstein, 3 Biss. 128; Waddams v. Humphreys, 22 Ill. 661; Moore v. Lowery, 27 Tex. 541; Anderson v. Smith, 5 Blackf. 395; Bennett v. McGuire, 58 Barb. 625. A deed made by an embarrassed debtor to one creditor, to the exclusion of all others, is not void, provided it be made in good faith to pay an honest debt. Totten v. Brady, 54 Md. 170. But *contra*, under Wisconsin statute (David v. Burchard, 53 Wis. 492). And provided the creditor so preferred does not act in bad faith nor obtain more than is justly due him. Arn v. Hoerseman, 26 Kan. 413. And see Shelley v. Boothe, 73 Mo. 74; Lucas v. Clalflin, 76 Va. 269; Bishop v. Jones, 28 Kan. 680. As to the right of debtor to prefer a

nection with other circumstances it may furnish strong evidence of fraud.[1] The question in such case depends upon the *bona fides* with which the transaction takes place.[2] The existence of the intent to defraud, hinder or delay must be established before the conveyance can be set aside.[3] The statute is designed solely to protect the rights of creditors, and consequently it renders a fraudulent transfer void only as against them. As against the grantor, his heirs and legal representatives, such a conveyance is good.[4]

creditor if done in good faith. O'Donald v. Constant, 82 Ind. 212; State Bank v. Whittle, 48 Mich. 1; Kellogg v. Richardson, 19 Fed. Rep. 70; Gruppenheimer v. Brookfield, 90 N. C. 282; Tootle v. Caldwell, 30 Kan. 125; Colbern v. Robinson, 80 Mo. 541; Smith v. Whitfield (Tex.), 2 S. W. Rep. 822; Osgood v. Thorne, 63 N. H. 375; Bishop v. Stebbins, 41 Hun, 243; Waterman v. Silberberg, 67 Tex. 100; Wood v. Clark (Ill.), 12 N. E. Rep. 271. Insolvency of itself not sufficient. Rathell v. Grimes (Neb.), 35 N. W. Rep. 392. The mere fact of relationship between the vendor and vendee, without other facts, affords no presumption of law against the *bona fides* of the sale. Schroeer v. Walsh (Ill.), 11 N. E. Rep. 70. A husband, though indebted, may prefer a wife, she being a *bona fide* creditor. Chapman v. Summerfeld, 36 Kan. 610; Dice v. Irwin, 110 Ind. 561; Hoes v. Boyer (Ind.), 9 N. E. Rep. 427; Farmers' Bank v. Warner, 68 Iowa, 147. But in such cases it must appear affirmatively that there was no fraudulent intent as against other creditors shared in by the wife. Burt v. Timmons (W. Va.), 2 S. E. Rep. 780. A deed of land from husband to wife before marriage in consideration thereof is a valuable consideration. Gibson v. Bennett (Me.), 9 Atl. Rep. 727.

[1] Kaine v. Weigley, 22 Pa. St. 179; Robinson v. Robards, 15 Mo. 459; Kuykendall v. McDonald, 15 Mo. 416; State v. Evans, 38 Mo. 150.

[2] Gamble v. Johnson, 9 Mo. 624; Randall v. Vroom, 30 N. J. Eq. 353. Where a married woman is equitably the owner, legal title being in her husband, who conveys to her, his creditors cannot impeach the conveyance.

[3] Cason v. Murray, 15 Mo. 378; Drum v. Painter, 27 Pa. St. 148.

[4] Stewart v. Dailey, 6 Litt. Cas. 212; Cheeseman v. Exall, 6 Exch. 341; Freeman v. Sedgwick, 6 Gill, 28; Gifford v. Ford, 5 Vt. 532; Stewart v. Iglehart, 7 Gill & J. 132; Dietrich v. Koch, 35 Wis. 618; O'Neill v. Chandler, 42 Ind. 471; George v. Williamson, 26 Mo. 190; Chapin v. Pease, 10 Conn. 69; Lawton v. Gordon, 34 Cal. 36; Harmon v. Harmon, 63 Ill. 512; Phettiplace v. Sayles, 4 Mason, 312; Canton v. Dorchester, 8 Cush. 525; Hartley v. McAnulty, 4 Yeates, 95; Terrell v. Imboden, 10 Leigh, 321; Sumner v. Murphy, 2 Hill (S. C.), 488; Byrd v. Curlin, 1 Humph. 466; Noble v. Noble, 26 Ark. 317; Leshey v. Gardner, 3 Watts.

§ 37. **Voluntary Conveyances.**—A voluntary conveyance is a conveyance without any valuable consideration. Consequently, the adequacy of the consideration does not enter into the question; neither does the intention or good faith of the grantee.[1] The exceptions in favor of innocent purchasers for value do not extend to innocent donees. The question as to the validity of a voluntary conveyance depends wholly on the motive of the donor.[2] If there is no intent to delay, hinder or defraud creditors, the conveyance is not within the statute; but if there is such an intent, then it is void.[3]

It was held by Chancellor KENT, that a voluntary conveyance by a person indebted is presumed fraudulent as against all existing debts, without regard to their amount, or to the extent of the property conveyed, or to the circum-

& S. 314; Simpson v. Graves, Riley's Ch. 232; Dale v. Harrison, 4 Bibb, 65; Newell v. Newell, 34 Miss. 385; Tuesley v. Robinson, 103 Mass. 558. As to heirs, see Stewart v. Aekley, 52 Barb. 283; Jackson v. Garnsey, 16 Johns. 182; Horner v. Zimmerman, 45 Ill. 14; Getzler v. Saroni, 18 Ill. 511; Cushwa v. Cushwa, 5 Md. 44; Danzey v. Smith, 4 Tex. 411; Jewell v. Porter, 31 N. H. 34. As to executors and administrators, see Howell v. Edmonds, 47 Ill. 79; Dorsey v. Smithson, 6 Har. & J. 61; Welsh v. Welsh, 105 Mass. 229; McLane v. Johnson, 43 Vt. 48. As to the subject generally, see Bump on Fraud. Conv.; Shaw v. Millsaps, 50 Miss. 380; Edwards v. Haverstick, 53 Ind. 348; Gould v. Steinburg, 84 Ill. 170; Hall v. Callahan, 66 Mo. 316; York v. Merritt, 80 N. C. 285.

[1] Foley v. Bitter, 34 Md. 646; Tunnison v. Chamblin, 88 Ill. 378; Bibb v. Freeman, 59 Ala. 612; Matson v. Melchor, 42 Mich. 477.

[2] Miller v. Thompson, 3 Port. 198; Gardner v. Boothe, 31 Ala. 186; Gamble v. Johnson, 9 Mo. 605; Wise v. Moore, 31 Ga. 148; Wood v. Hunt, 38 Barb. 302; Holmes v. Clark, 48 Barb. 237; Van Wyck v. Seward, 18 Wend. 375; Thompson v. Dougherty, 12 Serg. & R. 448; Benton v. Jones, 8 Conn. 186; Atkinson v. Phillips, 1 Md. Ch. 507. But see McAnally v. O'Neil, 56 Ala. 299; Kirksey v. Snedecor, 69 Ala. 192; Crawford v. Kirksey, 55 Ala. 282; Lucas v. Lucas, 103 Ill. 121; Woody v. Dean, 24 S. C. 499. But see where intent held not material. White v. McPheeters, 75 Mo. 286; Robinson v. Clark, 76 Me. 493.

[3] Freeman v. Burnham, 36 Conn. 469; Henry v. Fullerton, 13 Smed. & M. 631; Weed v. Davis, 25 Ga. 684; Clayton v. Brown, 17 Ga. 217; Hunters v. Waite, 3 Gratt. 26; Mixell v. Lutz, 34 Ill. 382; Marston v. Marston, 54 Me. 476; Holden v. Burnham, 63 N. Y. 74; Carr v. Breese, 81 N. Y. 584; McGowan v. Hitt, 16 S. C. 602.

stances of the party.[1] But this doctrine has been overruled,[2] and the learned chancellor himself, on a later consideration of the authorities, says, "Judge STORY evidently settles down upon the conclusion that mere indebtedness at the time would not *per se* establish that a voluntary conveyance is void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition and rank of the parties and the direct tendency of the conveyance to impair the rights of creditors. I have no doubt that such is the tendency of the decisions, both in England and America, and that the conclusions of fraud are to be left as matters of fact to a common jury. The doctrine in *Reade* v. *Livingstone*, and of the English chancellors on whom it rested is, as I greatly fear, too stern for the present times."[3]

It may then be considered as well settled law that, so far as existing creditors are concerned, a voluntary conveyance will be deemed fraudulent, when under all the circumstances of the case an intent to defraud is apparent.[4]

It is not necessary, however, to prove actual intent. The law does not assume to deal with the secret motives or consciences of men, but judges their intentions by their

[1] Reade v. Livingstone, 3 Johns. Ch. 481.

[2] Hunters v. Waite, 3 Gratt. 39; Verplank v. Sterry, 12 Johns. 557; Jackson v. Town, 4 Cow. 603; Stewart v. Jackson, 8 Cow. 406; Jackson v. Peck, 4 Wend. 300; Brackett v. Waite, 4 Vt. 389; Bank of U. S. v. Husman, 6 Paige, 526; Salmon v. Bennett, 1 Conn. 525; Hopkirk v. Randolph, 2 Brocken. 132; Wilson v. Kohlheim, 46 Miss. 346; Pratt v. Curtis, 2 Lowell, 87; Holden v. Burnham, 63 N. Y. 74; Genesee River Bank v. Mead, 92 N. Y. 637.

[3] 2 Kent's Com. 442. note *a*.

[4] Hunters v. Waite, 3 Gratt, 44; Lane v. Kingsbury, 11 Mo. 402. But see Young v. White, 25 Miss. 146; Toney v. McGeohee. 38 Ark. 419. It is held void by presumption of law in Alabama. Bibb v. Freeman, 59 Ala. 612; Early v. Owens, 68 Ala. 171; Goodman v. Wineland, 61 Md. 449; Bohannon v. Combs, 79 Mo. 305. So also in New Jersey, following Reade v. Livingstone, *supra*, Claflin v. Mess. 30 N. J. Eq. 211; O'Daniel v. Crawford, 4 Dev. (N. C.) 197. And see Stevens v. Robinson, 72 Me. 381; Fink v. Denny, 75 Va. 663; Spence v. Dunlap, 6 Lea (Tenn.). 457.

acts.[1] Every man is presumed to intend the necessary consequences of his own act.[2] If the consequence of a conveyance is to delay or defraud creditors, and this might have been foreseen by a person of ordinary sagacity,[3] the presumption of the intent is conclusive.[4]

Different degrees of stringency have been applied to conveyance made to a child or a settlement upon the wife, and those made to other persons.[5] The validity of the former seems to depend upon the condition of the grantor, as to his ability to pay his debts out of his remaining property at the time the conveyance is made.[6] In some of the States such a conveyance made with a fraudulent intent would be void as to future or subsequent, as well as prior creditors.[7] While in other courts, it seems to have been held that no one

[1] Van Wyck v. Seward, 18 Wend. 375. The presumption of fraud arises and may exist without the imputation of moral turpitude. Potter v. McDowell, 31 Mo. 62.

[2] Potter v. McDowell, 31 Mo. 62. The intent will be assumed from the act. Freeman v. Pope, L. R. 5 Ch. 538, criticizing Spirett v. Willows, 3 DeG. J. & S. 293.

[3] Accident, such as loss by fire or in trade, which human forethought could not guard against, will not invalidate a voluntary conveyance. Pepper v. Carter, 11 Mo. 540; Howard v. Williams, 1 Bailey (S. C.), 578; Brackett v. Waite, 4 Vt. 389.

[4] Hunters v. Waite, 3 Gratt. 26.

[5] Boyd v. De La Mantagnie, 73 N. Y. 592.

[6] Sparkman v. Place, 5 Ben. 184; Patten v. Casey, 57 Mo. 118; Lingke v. Wilkinson, 57 N. Y. 445; Cowen v. Alsop, 51 Miss. 158; Russell v. Hammond, 1 Atk. 15; Cutter v. Griswold, Walk. Ch. 457; Brooks v. Dalrymple, 12 Allen, 102; Pomeroy v. Bailey, 43 N. H. 118; Lerow v. Wilmuth, 9 Allen, 386; Baldwin v. Tuttle, 23 Iowa, 74; Gridley v. Watson, 53 Ill. 193; Hinde v. Longworth, 11 Wheat. 199; Spicer v. Ayres, 53 How. Pr. 405; Chambers v. Sallie, 29 Ark. 407; Brown v. Spivey, 53 Ga. 155; Emerson v. Bemis, 69 Ill. 537; Matthews v. Jordan, 88 Ill. 602; McCole v. Loehr, 9 Cent. L. J. 436; Taylor v. Eatman, 92 N. C. 601. But see Kirksey v. Snedecor, 60 Ala. 192.

[7] Mc Lean v. Johnson, 43 Vt. 48; Cosby v. Ross, 3 J. J. Marsh. 290; Parish v. Murphree, 13 How. 98; Williams v. Davis, 69 Pa. St. 21; Pratt v. Myers, 56 Ill 24; Van Wyck v. Seward, 6 Paige, 62; Parkman v. Welch, 19 Pick. 231; Laird v. Scott, 5 Heisk. 314; Miller v. Miller, 23 Me. 22; Spirett v. Willows, 3 DeG. J. & S. 293; Vertner v. Humphreys, 14 Smed. & M. 130; Wilcoxen v. Morgan, 2 Colo. 473. See Reade v. Livingstone, 3 Johns. Ch. 500; Churchill v. Wells, 7 Coldw. 364; Allaire v. Day, 30 N. J. Eq. 232.

can object to a fraudulent conveyance who was not a creditor at the time it was made.[1] Although the cases involving questions as to the rights of subsequent creditors seem to be in conflict, yet a careful examination will show them to be substantially in harmony and reconcilable upon this broad proposition, that a voluntary conveyance, *if made with fraudulent intent to defeat subsequent creditors*, will render it void, and that, as in the case of existing creditors, the question is one largely of intent.[2] It may be added, that such conveyances are uniformly held valid as between the parties and their representatives.[3]

It has been decided, that a conveyance of land to an intended wife, in consideration of marriage, is upon a valuable consideration.[4] But a mere voluntary conveyance of property by a husband to his wife, after marriage, not in fulfillment of a contract made before marriage, is not upon a

[1] Sexton v. Wheaton, 8 Wheat. 229; Lloyd v. Bunce, 4 Iowa, 660; Stone v. Myers, 9 Minn. 311; Coolidge v. Melvin, 42 N. H. 521; Beach v. White, Walk. Ch. 496; Bullitt v. Taylor, 34 Miss. 740; Herschfeldt v. George, 6 Mich. 466; Phillips v. Wooster, 36 N. Y. 412; Kane v. Roberts, 40 Md. 590; Phillips v. North, 77 Ill. 243; Lockhart v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 W. Va. 122; Kirksey v. Snedecor, 60 Ala. 192; Jones v. King, 86 Ill. 226; Tunnison v. Chamblin, 88 Ill. 378; Sheppard v. Thomas, 24 Kan. 780; Phœnix Bank v. Stafford, 89 N. Y. 405.

[2] Dodd v. Adams, 125 Mass. 398. See Benton v. Jones, 8 Conn. 186; Tunnison v. Chamblin, 88 Ill. 378; Sexton v. Wheaton, 8 Wheat. 229. Dissenting opinion of Hand, J., Bullitt v. Taylor, 34 Miss. 740; Laughton v. Harden, 68 Me. 208; Shand v. Handley, 71 N. Y. 319; Claflin v. Mess. 30 N. J. Eq. 211; Mut. Life. Ins. Co. v. Landfelder, 9 Mo. App. 285; Matther v. Heather, 34 N. J. Eq. 158; Barrows v. Barrows (Ind.), 9 N. E. Rep. 371; Marks v. Crow (Oreg.), 13 Pac. Rep. 55; Buckley v. Duff (Pa.), 8 Atl. Rep. 188. A subsequent creditor can only avail himself of the fraud which is practiced against him. Harlan v. Maglaughlin, 90 Pa. St. 294; Morrill v. Kilner, 113 Ill. 318. And see Jackson v. Miner, 101 Ill. 550.

[3] Osborne v. Moss, 7 Johns. 160; Jackson v. Garnsey, 16 Johns. 189; Strange v. Graham, 56 Ala. 614, and cases cited *supra*, § 36.

[4] Rainbolt v. East, 56 Ind. 538; McCole v. Loehr, 9 Cent. L. J. 436. An antenuptial settlement of lands, though made by the intended husband with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of his intended wife's participation in the fraud. Prewit v. Wilson, 103 U. S. 221; Otis v. Spence, 102 Ill. 622.

valuable consideration, and such conveyance will be avoided if fraudulent as to creditors.[1] The course of decisions in this country has been in favor of the general proposition that a voluntary conveyance, by either party to a marriage contract, of his or her entire property, made without the knowledge of the other and just prior to the marriage, is a fraud upon the marital rights of the other.[2]

§ 38. **Deeds Obtained by Fraud of the Grantee,** may be avoided by the grantor, within a reasonable time after discovering the fraud, by first restoring the consideration, but not otherwise.[3] No influence, however, short of fraud or duress exerted upon the grantor, will avoid a deed, unless it amounts to destroying his free agency.[4]

§ 39. **Conveyances Void for other Causes.**—It may be remarked, though perhaps not properly a part of the subject under consideration, that conveyances intended to give undue preference to creditors, and thus to prevent an equal distribution of the assets of a bankrupt, are void, as against bankrupt and insolvent laws.[5] But such a conveyance can only be disturbed by proceedings in bankruptcy or insolvency.[6] Bigelow, C. J., says, "If a debtor is unable to pay all his debts, he commits no fraud (in the absence of any statutory provision regulating the distribution of insolvent estates) by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. Nor does it make any difference that both creditor and debtor know that the effect of such appropriation will be to

[1] McCole v. Loehr, 9 Cent. L. J. 436.

[2] Swaine v. Perine, 5 Johns. Ch. 482; Smith v. Smith, 6 N. J. Eq. 515; Petty v. Petty, 4 B. Mon. 217; Leach v. Duvall, 8 Bush. 201; Duncan's Appeal, 43 Pa. St. 167; Kline v. Kline, 57 Pa. St. 120; Logan v. Simmons, 3 Ired. Eq. 487. But see Butler v. Butler, 8 Cent. L. J. 295; Hamilton v. Smith, 57 Iowa, 15.

[3] Thayer v. Turner, 8 Metc. 550; Bassett v. Brown, 105 Mass. 557. But see Bartlett v. Drake, 100 Mass. 174.

[4] Howe v. Howe, 99 Mass. 99.

[5] Nary v. Merrill, 8 Allen, 451; Penniman v. Cole, 8 Metc. 500. But are not fraudulent *per se* under general law as to fraudulent conveyances. Wilson v. Eifler, 7 Coldw. 31.

[6] Giddings v. Sears, 115 Mass. 505; Foster v. Hall, 12 Pick. 89.

deprive other creditors of the power of reaching the debtor's property by legal process, in satisfaction of their claims. If there is no secret trust agreed upon, or understood, between debtor and creditor, in favor of the former, but the sole object of the transfer of property is to pay or secure the payment of a debt, the transaction is a valid one at common law. The distinction is between a transfer of property, made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal."[1] Though, when such (insolvent or bankruptcy) proceedings are had, it seems that the assignee may go on, sell the land and convey a good title, without doing anything to set aside the conveyance by the debtor.[2]

In some of the States, a deed delivered on Sunday would be void.[3] But a deed made on that day will be good if delivered upon another day.[4]

[1] Love v. Wells, 25 Ind. 506; Wight v. Geer, 1 Root. 474; Kepner v. Keefer, 6 Watts, 231; Towle v. Larrabee, 26 Me. 464; Allen v. Deming, 14 N. H. 133.

[2] Swisher v. Williams, Wright (Ohio), 754; Love v. Wells, 25 Ind. 506. See Faxon v. Folvey, 110 Mass. 393.

[3] Banfild v. Whipple, 14 Allen, 13.

[4] Gibbs v. Thayer, 6 Cush. 30; Dwinel v. Perley, 32 Me. 197; Freeland v. Freeland, 102 Mass. 475; Hellans v. Abercrombie, 15 S. C. 110. So provided in Maine Rev. St. 1883, ch. 82, § 115.

CHAPTER II.—The Formal Parts of a Deed.

Article I. Different Forms of Deeds.
II. As to the Date of a Deed.
III. The Names of the Parties.
IV. Of the Recitals.
V. The Consideration.
VI. The Granting Clause.
VII. The Description of the Property.
VIII. The Habendum.
IX. The Reddendum.
X. Conditions, Limitations, and other Special Agreements.
XI. Uses, Trusts and Powers.
XII. Covenants for Title.
XIII. The Testimonium Clause.

ARTICLE I.

THE DIFFERENT FORMS OF DEEDS.

SECTION.
42. The common law conveyances.
43. Feoffment with livery of seizin.
44. Gift and demise.
45. Deed of grant.
46. Lease.
47. Exchange.
48. Partition.
49. Release.
50. Confirmation.
51. Surrender.
52. Assignment.

53. Defeasance.
54. Conveyances derived from the Statute of Uses.
55. Covenant to stand seized.
56. Bargain and sale.
57. Lease and release.
58. Fine and recovery.
59. Quitclaim deeds.
60. Deeds in use in the United States.
61. Indentures and deeds-poll.
62. The present division of the parts of a deed.

§ 42. **The Common Law Conveyances.**—According to the elementary writers, the original conveyances deriving their effect from the common law were, feoffment, gift, grant, lease, exchange and partition. The following were denominated derivative conveyances: release, confirmation, surrender, assignment and defeasance.[1] As but few of these are in use at the present time, as distinct forms of conveyance, a very brief mention of each will be sufficient.

§ 43. **Feoffment with Livery of Seizin** was, perhaps, the earliest mode of conveyance used in the common law. It signified originally the grant of a fee or feud, but came in time to signify the grant of an estate in fee-simple. A feoffment was a formal statement by the feoffor, or owner of the estate, that he gave it to the feoffee, and was completed by the feoffor's publicly putting the feoffee into possession of the land which he was to hold. The act of putting the party into possession, called livery of seizin, or delivery of possession, was either "in deed" or "in law," according as it took place on, or in sight of the land.[2] It was essential that the feoffment and livery of seizin should be made simultaneously; and, consequently, it was applicable only to estates which took effect in possession.[3] It became usual at an early date to embody the terms of a feoffment in a deed, or charter; but, for a long time after

[1] 2 Bl. Com. 310.

[2] Co. Litt. 48*a*; 2 Bl. Com. 315, 316.

[3] A feoffment might be employed for the creation of a remainder limited after a term of years, as the grant of a term did not transfer the feudal seizin to the termor. 2 Bl. Com. 166.

this custom was established, a deed was not essential, and if made, was only evidence of the transfer. It did not of itself pass the title. The conveyance by feoffment with livery of seizin has become infrequent, if not obsolete, in England; and never was adopted, except to a very limited extent, in this country.[1]

§ 44. **Gift and Demise.**—We have seen that the name "feoffment" came to signify an instrument conferring a fee-simple title. One which gave an estate tail, or one for life, was called gift, or a demise, or sometimes a lease, as the case might be.[2] The word gift denoted also the motive of the conveyance, so that a feoffment or grant, when gratuitous, might be called a gift.[3]

§ 45. **Deed of Grant.**—The term "grant" was anciently used to denote a transfer by deed of that which could not pass by livery. In strictness of usage, it denoted the conveyance of incorporeal rights; but the act of 8 and 9 Vict. 106, § 2, made a simple deed of grant, which took the place of the deed of lease and release, sufficient to convey corporeal as well as incorporeal hereditaments.[4] In the largest sense, the term is now applicable to all transfers of real property.[5] In New York, the term "grant" has been applied, by statute, to the forms of deeds adopted there, though retaining in all but name the characteristics of the deeds previously in use in that State. In Vermont, it applies to all conveyances by deed, except those of gift, and

[1] In Illinois and Missouri a feoffment, deed, or conveyance in writing, passes the estate without livery of seizin. 4 Kent Com. 490; Perry v. Price, 1 Mo. 553. See also Bryan v. Bradley, 16 Conn. 474. A recorded deed, in Pennsylvania, will be construed as a feoffment with livery of seizin or a deed under the Statute of Uses, as will best effect the intention of the parties. Eckman v. Eckman, 68 Pa. St. 460. In most of the States "feoffment with livery of seizin" is either expressly abolished or declared unnecessary. Stimson's Amer. St., § 1470.

[2] 2 Bl. Com. 316.

[3] Watkins, Conv. Preston's ed. 199. And see Pierson v. Armstrong, 1 Iowa, 282.

[4] Williams on Real Prop. 164.

[5] Ross v. Adams, 4 Dutch. 165.

in New Jersey, it means every ordinary mode of acquiring property by deed, including such as operate by way of uses.[1] The word "grant," taken largely, is where anything is granted or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word, without writing.[2] Incorporeal rights were said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law they could not be transferred by livery of possession. For this reason it was required that they should be conveyed by deed of grant, followed by the delivery of the deed to the grantee;[3] and by this means the precise nature and amount of the property transferred was clearly ascertained.[4]

§ 46. **A Lease,** as at present, was the mode of granting a term of years. Though, in early times, a term of years could be created by mere word of mouth, without any ceremony of writing, an entry by the lessee was always necessary in order to perfect the lease. After entry, he was capable of taking a conveyance of the reversion or remainder by deed alone, without any livery of seizin. A lease might also be made to commence at a future time, since the grant of a term does not affect the feudal seizin of the land.[5] Leases will be further considered in a future part of this work, to which the reader is referred for a more extended view of the subject.[6]

§ 47. **Exchange** was a mutual grant of equal interests in land, the one in consideration of the other. It might be made of estates in possession, or of those in reversion or

[1] 3 Washb. on Real Prop. 605.

[2] Wood on Conv. 7.

[3] And such is the law now. Huff *v.* McCauley, 53 Pa. St. 206.

[4] Where "give and grant" are followed by "bargained and sold," it qualifies the mode of gift and grant, and converts it into a bargain and sale, without its being a feoffment. Matthews v. Ward's Lessee, 10 Gill & J. 443.

[5] An assignment of a lease to commence *in futuro* held good. Williams v. Downing, 18 Pa. St. 60.

[6] See title II.

remainder; but it was essential that the property exchanged should be of the same kind, although not necessarily of the same value.[1] Thus, a fee-simple could be exchanged for another fee-simple, but not for an estate for life or years. No livery of seizin was necessary in any case, though the exchange was not complete until perfected by actual entry of both parties on their new lands. If the property exchanged consisted of estates not in possession, then a deed was necessary to make the transaction valid,[2] in which case it was necessary that the word "*escambium*," or exchange, be used; and this could not be supplied by any other word, or described by circumlocution. It seems also to have been necessary that the deed should be indented.[3]

§ 48. **Partition** was a division of real estate made between coparceners, tenants in common or joint tenants. Livery of seizin was necessary in every case of partition, and if the partition was made between joint-tenants or tenants in common, a deed was also necessary.[4] Partition, as a means of securing a division of property owned in joint tenancy, tenancy in common or coparcenary, still exists, though not retaining its ancient features. In England, since the time of Elizabeth, the power of compelling partition has been exercised by chancery.[5] In the United States the right has been recognized in courts of equity, as well as in courts of law, under provisions of statute.[6]

§ 49. **Release** was the form of assurance used to convey a right or benefit, to the owner, of some existing estate in possession, or of such an interest as qualified him for receiving or availing himself of the right or benefit so relinquished;[7] such, for instance, as adding a reversion or

[1] Co. Litt. 51*a*.

[2] Dean's Princ. of Conv. 303.

[3] Co. Litt. 51; 3 Wood, Conv. 243; Watkins, Conv. b. 2, ch. 5; Cruise, Dig. Tit. 32.

[4] 2 Bl. Com. 324.

[5] Wash. on Real Prop. 677; Story's Eq. Jur., § 647.

[6] Whitton v. Whitton, 36 N. H. 326; Patton v. Wagner, 19 Ark. 233; Spitts v. Wells, 18 Mo. 468; Adam v. Ames Iron Co., 24 Conn. 230; Greenup v. Sewell, 18 Ill. 53; Wilbridge v. Case, 2 Carter (Ind.), 36.

[7] Burton Real Prop. 15; Shep. Touch. 320.

remainder to an estate for life or for years, or passing an undivided share in land to a joint tenant. In every case it was necessary that there should be an actual privity of estate at the time between the releasor and releasee, who must have an estate actually vested in him capable of enlargement.[1] The estate of the releasee being already in possession, no livery of seizin was necessary, but a deed was required in every case of an express release by act of the parties.[2] The words generally used in such a conveyance were "remise, release and forever quitclaim," [3] corresponding to our *quitclaim* deeds. But the technicalities of the English law as to releases are not generally applicable in this country;[4] though in some States they only differ from a quitclaim deed, in that the latter is regarded as an original conveyance in American law.[5]

§ 50. **Confirmation,** or *confirmatio*, is defined to be "the conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or

[1] 2 Bl. Com. 325.

[2] Dean's Princ. Conv. 304.

[3] Litt. § 445.

[4] 2 Bouv. Inst. 416. At common law a freehold title could be leased in five ways: 1. To the tenant of the freehold in fact or in law without any privity. 2. To the remainderman. 3. To the reversioner without privity. 4. To one having a right only by privity. 5. To one having a privity only without right. But in this country, the technical rules relating to releases are generally held not to apply and a quitclaim deed is considered as passing the title of the releasor, without any warranty as to outstanding title or incumbrances, but merely against the grantor himself and those claiming under him, either by descent or subsequent conveyance. Smith v. Bank, 21 Ala. 125.

[5] Kerr v. Freeman, 33 Miss. 292; Rogers v. Hillhouse, 3 Conn. 398; Hall v. Ashby, 9 Ohio, 96; Wade v. Howard, 6 Pick. 492. A deed of release and quitclaim is as effectual, for the purpose of transferring title to land, as a deed of bargain and sale. Doe v. Reed, 5 Ill. 117. See, as to quitclaim deeds, § 59. And in many of the States a deed of quitclaim and release will pass all the estate that could lawfully be conveyed by deed of bargain and sale. Stimson's Amer. St., § 1472.

whereby a particular estate is increased or enlarged."[1] Confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law.[2] To make a valid confirmation the party must be apprised of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm the transaction.[3] Though not in general use in this country, a confirmation deed will be given effect, under certain circumstances, as a bargain and sale.[4]

§ 51. **Surrender** is defined by Lord Coke to be "a yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement."[5] A surrender was the converse of a release. The latter operated by the greater estate descending upon the less, the former by the falling of a less estate into a greater. A surrender differed from a release also in not requiring any deed; but it was essential, as in case of a release, that there should be privity of estate between the parties.

§ 52. **Assignment** is the transfer of the interest one has in lands and tenements. It is more particularly applied to the transfer of the unexpired residue of a term of years, in which case it has the effect of putting the assignee in the place of the former lessee, and making him at once liable to all the obligations of the lease, although he may not have entered on the land.[6] This subject is discussed at some length in a future chapter.[7]

§ 53. **Defeasance** was a collateral deed, made at the same time as a feoffment, and containing certain conditions, on performance of which the estate created might be

[1] Shep. Touch. 311. And see English v. Young, 10 B. Mon. 143; Ing v. Brown, 3 Md. Ch. 521.

[2] Co. Litt. 295. Branham v. San Jose, 24 Cal. 585.

[3] As to the confirmation of a defeasible estate, see Adlum v. Yard, 1 Rawle, 171; Stroble v. Smith, 8 Watts, 280.

[4] Love v. Shields, 3 Yerg. 405; Fauntleroy v. Dunn, 3 B. Mon. 594.

[5] Co. Litt. 337*b*.

[6] Deane's Princ. Conv. 302.

[7] Chapter VII, Art. II.

defeated.[1] It was in this manner that mortgages were usually made, the mortgagor, enfeoffing to the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on payment of the money borrowed at a certain day.[2] But after the passing of the Statute of Uses, it became customary to insert the conveyance of an estate, and any conditions to which the conveyance was made subject, in the same deed; and thus separate deeds of defeasance fell into disuse.[3]

§ 54. **The Conveyances which Derived their Effect from the Statute of Uses** were covenants to stand seized, bargain and sale, lease and release.

§ 55. **A Covenant to Stand Seized to Uses** was a covenant whereby a man, seized of lands, covenanted in consideration of blood or marriage to stand seized of the same to the use of his child, wife or kinsman, for life, in tail or in fee; in which case the statute executed the use by transferring it into legal possession. This conveyance could only operate upon a consideration of blood or marriage.[4] It has long since fallen into disuse as a mode of conveyance, though the doctrine is frequently resorted to by courts in order to give effect to the intention of parties who have undertaken to convey lands by deeds, which are insufficient

[1] 2 Bl. Com. 327.

[2] In many States where a conveyance of real estate is made, which by another instrument or writing shall be made defeasible, such other instrument must be recorded therewith or the grantee takes nothing under the principal conveyance. Stimson Amer. Stat., § 1860. But in others, unless defeasance is recorded, the first conveyance passes an absolute title, except as against the maker of the instrument, his heirs and devisees. Mass. Pub. Stat. 1882, ch. 120, § 23; Me. Rev. Stat. 1883, ch. 73, § 9. Pa. Stat. 1881, § 91; Ind. Rev. Stat. 1881, § 2932; Mich. Howell's Ann. Stat., § 5686; Wis. Rev. Stat. 1878, § 2243; Minn. Gen. Stat. 1878, ch. 40, § 23; Kan. Comp. Laws 1879, ch. 68, § 2; Cal. Code 1876, § 7950. Oreg. Gen. Laws 1872, ch. 6, § 28; Dak. Civ. Code, § 1741; Wy. Laws, 1882, ch. 1, § 18; Ala. Code, 1876, § 2168.

[3] Deane's Prine. of Conv. 304; Co. Litt. 236.

[4] 2 Bl. Com. 338. And see Bell v. Seammon, 15 N. H. 381; Rollins v. Riley, 44 N. H. 9; Watson v. Watson, 24 S. C. 228.

for the purpose under the rules required in other forms of conveyance.[1]

§ 56. **A Bargain and Sale** was a contract or bargain by which the bargainor, for some pecuniary consideration,[2] bargained and sold, that is, contracted to convey the land to the bargainee, whereupon a use arose in favor of the latter,

[1] 2 Washb. Real Prop., 4th ed., 425: Horton v. Sledge, 29 Ala. 478; Exum v. Canty, 34 Miss. 569; Rogers v. Eagle Fire Co., 9 Wend. 611; Wall v. Wall, 30 Miss. 92. It is generally held that, if a deed cannot take effect as a bargain and sale for want of a pecuniary consideration or because the estate is limited *in futuro*, yet, in order to carry out the intentions of the parties, it may be valid as a deed of covenant to stand seized, if a consideration of blood exists. Eckman v. Eckman, 68 Pa. St. 460; Jackson v. Zwart, 20 Johns. 84; Brewer v. Hardy, 22 Pick. 376; Bank v. Houseman, 6 Paige, 526; Wallis v. Wallis, 4 Mass. 135. But the consideration of blood or marriage must exist. Emery v. Chase, 5 Me. 232; Jackson v. Sebring, 16 Johns. 515; Gault v. Hall, 26 Me. 561; Bell v. Scammon, 15 N. H. 381. But in a case in Massachusetts the court, after discussing the reason of the rule which existed in England that a consideration of blood or marriage is absolutely essential to the validity of a covenant to stand seized, held that "it was artificial and constructive, depending entirely upon the English Statute of Enrollments and having no pretext for continued existence where the provisions of that statute do not apply," and that the deed in that case might be maintained as a covenant to stand seized, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee. Trafton v. Hawes, 102 Mass. 533. And see Jackson v. Caldwell, 1 Cowen, 639; Exum v. Canty, 34 Miss. 569.

[2] If there is is no pecuniary consideration, it cannot operate as a bargain and sale. Jackson v. Cadwell, 1 Cow. 639; Wood v. Chapin, 13 N. Y. 509; Corwin v. Corwin, 6 N. Y. 342. Though it has been held that any consideration that is valuable is sufficient. Den v. Hanks, 5 Ired. 30; Jackson v. Leek, 19 Wend. 339; Wood v. Beach, 7 Vt. 522; Busey v. Reese, 38 Md. 264. And in Illinois, Missouri and Tennessee, a consideration has been held unnecessary. Perry v. Price, 1 Mo. 553; Jackson v. Dillon, 2 Overt. (Tenn.) 261; Fetrow v. Merriwether, 53 Ill. 278. A deed, not good as a lease and release, nor as a covenant to stand seized to use, for want of a proper consideration, nothwithstanding the words "remise, release and quitclaim," is good as a deed of bargain and sale, if it expresses a pecuniary consideration and evidently intends to convey *in presenti* all the estates of the grantor. Lynch v. Livingston, 8 Barb. 463. Any writing that sufficiently identifies the parties, the land, acknowledges a sale in fee of the vendor's right, for a valuable consideration, is signed and sealed by the grantor and duly attested, is a good deed of bargain and sale. Chiles v. Conley's Heirs, 2 Dana (Ky.), 21. And see Wilson v. Irish, 62 Iowa, 260.

to whom the seizin was transferred by force of the Statute of Uses.[1] It will be seen that the statute thus obviated the necessity of livery of seizin.[2] To prevent secret conveyances and give notoriety to the ownership of freehold estates, it was enacted by the same statute that such bargains and sales should not enure to pass a freehold, unless the same were made by indenture, and enrolled within six months after execution.[3] But bargains and sales of chattel interests were not thought of sufficient importance, or were overlooked in framing the statute, and were not required to be enrolled. The conveyancers seized upon this omission as a means of avoiding the intention of the statute by the invention of the assurance next to be considered.

§ 57. **Lease and Release.**—We have seen that, if a lessee were in the actual possession of the land demised, no livery of seizin was requisite to convey the remainder of the estate to him; and also, that a bargain and sale, for a valuable consideration, raised a use in the bargainee, which the statute turned into actual possession. Thus, a bargain and sale for a term of years made the bargainee a lessee for years

[1] In most of the States the form of deed in general use is that of bargain and sale. 2 Washb. on Real Prop. 4th ed. 439. Whether a freehold can be limited to commence *in futuro* by a deed of bargain and sale, is a subject which has been much discussed and upon which the authorities are not agreed. The negative has been held by some courts. Pray v. Pierce, 7 Mass. 381; Parker v. Nichols, 7 Pick. 115; Gale v. Coburn, 18 Pick. 397; Brewer v. Hardy, 22 Pick. 376; Marden v. Chase, 32 Me. 329; Welsh v. Foster, 12 Mass. 96. But *contra*, Jackson v. Dunsbagh, 1 Johns. Cas. 96; Rogers v. Eagle Fire Co., 9 Wend. 611; Jackson v. Zwartz, 20 Johns, 87; Davis v. Speed, 12 Modern, 39; Wyman v. Brown, 50 Me. 150; Jordan v. Stevens, 51 Me. 79; Drown v. Smith, 52 Me. 141; Brewton v. Watson, 67 Ala. 121. Even did not the statute sanction such a conveyance, nothing in the policy of the law forbids it. Ferguson v. Mason, 60 Wis. 377. The weight of authority at the present day is in support of the proposition that a freehold can be so limited. 3 Washb. on Real Prop. 4th ed., 373. In many States, by statute any estate, freehold or chattel may be made to commence *in futuro* by deed or will, whether with or without the intervention of a precedent estate. Stimson's Amer. Stat., § 1421.

[2] Cheney v. Stevens, 9 Mass. 77.

[3] 2 Bl. Com. 338.

in actual possession, and, as such, capable of taking a release of the remainder of the grantor's estate, without any livery of seizin or other public ceremony. This gave rise to the assurance by lease and release, which came to be almost the universal mode of conveying freehold estates.[1] It consisted first of an instrument stating that the vendor, in consideration of some nominal sum, had bargained and sold the land to the purchaser for one year to commence from the day previous to the date of the deed, which was followed by a second deed releasing the reversion to him, by which he was put into possession of the whole estate intended to be conveyed. Thus, a conveyance by lease and release was said to amount to a feoffment.[2] The foregoing were called ordinary assurances: that next to be mentioned was called an extraordinary assurance.

§ 58. **Fine and Recovery** was the method used for converting an estate tail into a fee-simple, by means of a prearranged suit between the tenant in tail, as defendant, and a friendly plaintiff, in which the latter was declared owner in fee-simple of the lands entailed; and thus the estate became alienable, and might be dealt with in any manner that the tenant in tail should desire. Upon the passage of the Statute of Uses, where a fine and recovery was accompanied by a declaration to uses in the proper form, it constitued a conveyance to uses.[3]

§ 59. **Quitclaim Deeds.**—Before passing, it is thought proper to notice a form of deed which is peculiarly American and is recognized in almost all of the States, either by statute or by decisions of court. Though, at common law,

[1] This form of conveyance was in use in England until the Statute 8 and 9 Vict. 106. It has been employed in this country, though very rarely. Williams on Real Prop. 164; Lewis v. Beall, 4 Har. & McH. 488; Craig v. Pinson, 1 Cheves, 272.

[2] Co. Litt. 270; 2 Bl. Com. 399; Deane's Princ. Conv. 308, 309.

[3] 2 Washb. Real Prop. 4th ed. 423. But this mode of conveyance was abolished in England by statute, and never has prevailed to any extent in this country. But see McGregor v. Comstock, 17 N. Y. 162; Richman v. Lippincott, 5 Dutch. 44; Croxall v. Shererd, 5 Wall. 268; Moreau v. Detchemendy, 18 Mo. 527.

a deed of release made to one who has neither an estate in, nor possession of land would be void, yet this deed of "quitclaim" has, by long established practice, been held as effective to pass the title to land as any other.[1] In most respects it resembles the old deed of release, except that the latter, under the strict construction of the common law, could only be made to one who had some interest in, or possession of the land.[2] Some of our courts in construing the effect of a quitclaim deed, hold that, as it only purports to convey such title as the grantor has, it does not give one who claims under it the right of a *bona fide* purchaser without notice.[3] But we confess our inability to see any good reason for the rule. It would hardly be claimed, since the abolition of the tortuous operation of a feoffment, that any form of deed can pass any greater title than the grantor has in the premises; though a grantee may acquire rights, upon the principle of estoppel, which were not conveyed to him by deed. As the covenants in a deed are no part of the conveyance, and since a quitclaim deed is held sufficient to pass whatever title the grantor has, whether legal or equitable,[4] independent of any interest having pre-

[1] Hunt v. Hunt, 14 Pick. 374; Bayer v. Cockerill, 3 Kan. 282; Rogers v. Hillhouse, 3 Conn. 398; Hall v. Ashby, 9 Ohio, 96; McConnel v. Reed, 4 Scam. 117; Kerr v. Freeman, 33 Miss. 292; Bogy v. Shoab, 13 Mo. 380; Touchard v. Crow, 20 Cal. 150; Hamilton v. Doolittle, 37 Ill. 482; Downer v. Smith, 24 Cal. 123; Platt v. Brown, 30 Conn. 336; Young v. Clippinger, 14 Kan. 148; Thompson v. Spencer, 50 Cal. 532. A quitclaim simply employing the words "remise, release and forever quitclaim," contains sufficient operative words of conveyance. Wilson v. Albert, 89 Mo. 537.

[2] Kyle v. Kavanagh, 103 Mass. 356; Rowe v. Beckett, 30 Ind. 154; Ely v. Stannard, 44 Conn. 529; Kerr v. Freeman, 33 Miss. 292. See *supra*, § 49.

[3] May v. Le Claire, 11 Wall. 232; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Stoffel v. Schroeder, 62 Mo. 147.

[4] Farmers' Loan Co. v. McKinney, 6 McLean, 1; Jackson v. Hubble, 1 Cowen, 613; Field v. Columbet, 4 Sawyer, 523; Patterson v. Snell, 67 Me. 559; Butcher v. Rodgers, 60 Mo. 138; Walker v. Lincoln, 45 Me. 67; Carpentier v. Williamson, 25 Cal. 154; Smith v. Pollard, 19 Vt. 272; Coe v. Persons, 43 Me. 432.

viously been vested in the grantee or other person, we can conceive of no sufficient reason why one who is actually a *bona fide* purchaser, for value, without notice, should not be so regarded, even though he receives a quitclaim deed. And some of the courts, taking a like view of the question, have not adopted the rule above stated.[1] A quitclaim deed will not pass an after-acquired title. But in a recent case in Illinois it was held that, if a party, having the equitable title to land and being entitled to the legal title, conveys the same by a quitclaim deed, and subsequently acquires the legal title, it will enure to his grantee.[2] So it has been held, that a quitclaim deed passes to the grantee the covenants running with the land, unless there be words limiting the conveyance.[3]

§ 60. **The Deeds in Use in the United States** were derived from the ancient assurances, and some of them, particularly those affecting leasehold estates, are almost identical; but our purpose, at present, is to speak of the form of deeds ordinarily used for the conveyance of estates in fee.[4] Of these it may be said that, while the forms in use in all of

[1] Pittingill v. Devin, 35 Iowa, 354; McConnel v. Reed, 4 Scamm. 117; Rowe v. Beckett, 30 Ind. 154; Graff v. Middleton, 43 Cal. 341.

[2] Welch v. Dutton, 79 Ill. 465. And see Frost v. Methodist, etc. Soc., 56 Mich. 62.

[3] Brady v. Spurck, 27 Ill. 478. And see Green Bay, etc. Canal Co. v. Hewett, 55 Wis. 96.

[4] Courts, both in England and in this country, are very liberal in construing deeds, so as to give them effect if possible; and although intended to come within one class, if they cannot be made operative in that form, on account of some defect, they are often found capable and permitted to accomplish the purposes of the parties, by a construction that brings them within some other class of deeds known to the law. 3 Washb. on Real Prop. 4th ed. 357. And see Exum v. Canty, 34 Miss. 534; Steel v. Steel, 4 Allen, 417; Horton v. Sledge, 29 Ala. 478; Wall v. Wall, 30 Miss. 91; Eckman v. Eckman, 68 Pa. St. 460. Under the California statute of conveyances, any words in a deed, indicating an intention to transfer the estate, interest or claims of the grantor, will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the Statute of Uses. Field v Columbet, 4 Sawyer, 523.

the States have probably been borrowed from some of the common-law conveyances, they have been more or less modified by statute or usage, so that none of them is exactly identical with the former. Yet, with the exception of a few of the States in which certain requisites are prescribed, more or less in conflict with the common law, and with the exceptions created by the introduction of registry laws, the common-law assurances may be regarded as sufficient and effectual forms of conveyances.[1] Mr. Washburn, in this connection, refers to a number of instances showing a general recognition of the common-law forms of conveyance, even where the subject has been regulated by statute.[2] But it is not our purpose to attempt to review the legislation upon this subject, or to discuss the different forms of deeds in use in the several States. So far as a form is concerned, it is thought sufficient, for the purposes of this work, to follow a general division of the parts of a deed, as indicated at the head of this chapter, which, it is believed, embraces the constituent elements of the conveyances in common use in all the States.[3]

§ 61. **The Distinction between the Form of an Indenture and a Deed-Poll** is sometimes recognized by the courts in the construction of deeds, and should, therefore, be mentioned under this head. The word "indenture" is used to describe a deed to which two or more persons are parties, and in which these enter into reciprocal obligations toward each other; whereas, a deed-poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number.[4] Indentures were formerly executed in

[1] In New York, deeds are required to be made directly to the person in whom the possession and profits are intended to be vested, and not to the use of or in trust for such person. N. Y. Rev. St. 4th ed., p. 148. So in Minnesota. Stat. at Large, 1873, Vol. 1, ch. 35, § 1. And see Montgomery v. Sturdivant, 41 Cal. 290.

[2] 3 Washb. on Real Prop., 4th ed. 358, 362.

[3] See Chiles v. Conley's Heirs, 2 Dana (Ky.), 21.

[4] Williams on Real Prop. 155; 3 Washb. on Real Prop., 4th ed., 310.

two or more parts upon the same piece of paper or parchment, and then cut apart with an irregular line, so that the edge of one part would fit into the other, and thus establish the authenticity of the several parts. When the parchment was so intended it was usual for each party to sign but one of the parts interchangeably; but at length it became usual for each party to execute all the parts, and to simply cut the deeds with an indented or waved line at the top. Such conveyances usually commence now with the words "This indenture," etc., and are no longer indented. A deed made by only one party was polled or shaved even at the top, and was therefore, called a *deed-poll*. They usually begin with the words, "Know all men by these presents," etc., and are commonly written in the first person; yet both indentures and deeds-poll may be written in either the first or third person.[1] It has been held that a party to an indenture, made and executed by another to him, will become a covenantor and liable as such, though he may not sign and seal the deed, if he is named in it and accepts it, and it contains covenants which, by the terms of the deed, he is to perform;[2] while in a deed-poll the remedy against a grantee for failing to perform a duty prescribed in the deed was assumpsit. This distinction however, has not been generally followed. Thus, in some States, the remedy in either case is assumpsit,[3] while in others covenant will lie though it be a deed-poll.[4]

§ 62. **The Present Divisions of the Parts of a Deed.**— The formal parts of a deed are ordinarily treated under the following heads: 1. The premises. 2. The habendum. 3. The reddendum. 4. Conditions. 5. Warranty. 6. Covenants; the premises embracing all that part of the deed preceding the habendum. In the present division of parts we have purposely disregarded technical rules, for conven-

[1] Shep. Touch. 51, 53; Currie v. Donald, 2 Wash. (Va.) 58.

[2] Finley v. Simpson, 22 N. J. L. 311.

[3] Goodwin v. Gilbert, 9 Mass. 510; Moule v. Weaver, 7 Pa. St. 329; Johnson v. Muzzy, 45 Vt. 419; Hinsdale v. Humphey, 15 Conn. 431.

[4] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.

ience of reference, and in order to treat separately each point to be noticed in examining or drawing a deed, in the order in which they usually occur.

ARTICLE II.

AS TO THE DATE OF A DEED.

SECTION.

65. General rules as to the date.

§ 65. **The Date** is sometimes inserted at the commencement of a deed, and sometimes in the testimonium clause. It is immaterial where it appears; nor is it essential to the validity of a deed that it be dated, provided the date of its delivery can be proved.[1] The instrument takes effect from the time of delivery and not from its date.[2] The date of a deed may be contradicted, as not essential to its operation,[3] though it is *prima facie* evidence of the time of its execution and delivery.[4] But when a deed is acknowledged on a day subsequent to its date, and there is no proof of delivery prior to the acknowledgment, it must be presumed to have been delivered afterwards,[5] or at least as early as the day of

[1] Co. Litt. 46; Thompson v. Thompson, 9 Ind. 323.

[2] Meech v. Fowler, 14 Ark. 29; Jackson v. Shoonmaker, 2 Johns. 235; Costigan v. Gould, 5 Den. 290; Lyerly v. Wheeler, 12 Ired. (N. C.) L. 290; Nevlin v. Osborn, 4 Jones (N. C.) L. 157; Colquhoun v. Atkinson, 4 Munf. (Va.) 550.

[3] Blake v. Fash, 44 Ill. 302. And this may be done by parol evidence. Sweetser v. Lowell, 33 Me. 446.

[4] Darst v. Bates, 51 Ill. 439; 1 Wood's Conv. 195; Shep. Touch. 58, 72; Billings v. Stark, 15 Fla. 297; Ellsworth v. Central R. R. Co., 34 N. J. L. 93; McConnell v. Brown, Litt. (Ky.) Sel. Cas. 459; Jayne v. Gregg, 42 Ill. 413; County of Henry v. Bradshaw, 20 Iowa, 355; Ford v. Gregory, 10 B. Mon. 175; Sweetser v. Lowell, 33 Me. 446; Harris v. Norton, 16 Barb. 264. But see Fontaine v. Boatmen's Saving Inst., 57 Mo. 552.

[5] Blanchard v. Tyler, 12 Mich. 339.

acknowledgment.[1] The presumption arising from its date, that it was delivered on that day, cannot stand against the positive averments in the acknowledgment, that it was executed afterwards.[2] In another case, where the date written upon a revenue stamp was later than that of the deed, the court held that the presumption was that the delivery was made at the time of the cancellation of the stamp.[3] The *prima facie* presumption as to the date of the delivery of a deed may be rebutted by proof.[4] And where the proof shows that the deed was antedated, the date furnishes no indication of the time of its actual execution.[5] It has been held that a deed, executed by several grantors, is to be considered as dated when the last grantor executed it.[6] And the Supreme Court of Kentucky ruled that, when the date in the body of a deed was one year before the date at the foot, the latter should be considered as the true date of the execution of the deed.[7]

ARTICLE III.

THE NAMES OF THE PARTIES.

SECTION.

67. It is sufficient if the parties are distinguished.
68. The grantor should be named in the deed.
69. A deed must be to some certain person or corporation named.
70. Illustrations of the foregoing principles.
71. Matter descriptive of the parties.

§ 67. **In Naming the Parties the Object is to Distinguish those Intended from the Rest of the World.**—If

[1] Clark v. Akers, 16 Kan. 166; Loomis v. Pingree, 43 Me. 299.
[2] Henderson v. Baltimore, 8 Md. 353.
[3] Van Rensselear v. Vickery, 3 Lansing. 57.
[4] Elsey v. Metcalf, 1 Denio, 323.
[5] Costigan v. Gould, 5 Denio, 290.
[6] Kurtz v. Hollingshead, 4 Cranch C. C. 180.
[7] Morrison v. Caldwell, 5 T. B. Mon. 426.

this is effected it is sufficient, though the true name be not used, or even no name at all. But the persons intended as parties must be designated in some manner in the deed.[1] The maxim is, "That is certain which may be made certain."[2] Therefore, any name or description which ascertains the parties with certainty, so as to distinguish them from all others, is sufficient, though it be not accurate in point of fact.[3] But any uncertainty as to the persons intended would render the deed void.[4] It seems that if the grantor's true name is recited in the body of the deed, and he also acknowledges it by his true name, the fact that he signs it by a wrong name does not invalidate the conveyance.[5]

§ 68. **The Grantor should be Named in the Deed.**—It was held by the Supreme Court of New Hampshire that one

[1] Chase v. Palmer, 29 Ill. 306. There must be a grantee named. Whitaker v. Miller, 83 Ill. 381.

[2] Broom's Leg. Max., 7th ed. 622; Co. Litt. 3*a*; 1 Wood on Conv. 160, 164, 171. Applied to sustain a deed to "P. and her children, and to their heirs and assigns forever." Hamilton v. Pitcher, 53 Mo. 334. A deed to "P. or her heirs," held good. Hogan v. Page, 2 Wall. 607; Ready v. Kearsley, 14 Mich. 225. And a deed to "the heirs of A. B.," he being dead. Boone v. Moore, 14 Mo. 420; Shaw v. Land, 12 Mass. 447. Also a deed "to the children of A." Hogg v. Odom, Dudley (Ga.), 185. But see Hunter v. Watson, 12 Cal. 363. But a deed, made to the heirs of a living person named therein without giving the names of the heirs, is void. Morris v. Stephens, 46 Pa. St. 200; Winslow v. Winslow, 52 Ind. 8. A grantee, if not named, must be so described as to make him capable of designation. Simmons v. Spratt, 20 Fla. 495.

[3] 1 Wood on Conv. 160, 161; Newton v. McKay, 29 Mich. 1. The name by which a person is generally known is sufficient, though different from that of his baptism. Counden v. Clerke, Hob. 32*a*. See also Erskine v. Davis, 25 Ill. 251. Held that evidence *aliunde* a deed is admissible to identify the grantor. Wakefield v. Brown (Minn.), 37 N. W. Rep. 788.

[4] Thomas v. Marshfield, 10 Pick. 367; Garnett v. Garnett, 7 T. B. Mon. 545. A deed to a dead man and his heirs is a nullity, for "heirs" is not a word of purchase. Hunter v. Watson, 12 Cal. 363.

[5] Middleton v. Findla, 25 Cal. 76. And see Lyon v. Kain, 36 Ill. 362. Where the true owner of land is the person who, in fact, executed and delivered a deed of conveyance, it will be effectual as between the grantor and grantee, although the grantor executed it under an assumed name or the one who drew the deed made a mistake in his Christian name. Wakefield v. Brown (Minn.), 37 N. W. Rep. 788.

who signs, seals and delivers a deed is bound as grantor by such acts, although he is not named as grantor in the deed.[1] But that doctrine seems to have been overruled by later cases, which hold that something more is necessary, viz., that the party must, in the deed, show, by apt words, an intention to convey.[2] The rule is thus stated by TANEY, J.: "Now, in order to convey by grant, the party possessing the right must be the grantor and use apt and proper words to convey to the grantee; and merely signing, sealing and acknowledging an instrument, in which another person is grantor, is not sufficient."[3]

§ 69. **A Deed, to be Valid, must be to some Certain Person or Corporation Named,** who can take by force of the same and hold in his own right, or as a trustee. An unincorporated community, association or town cannot purchase and take in succession.[4] So a deed to a fictitious person,[5] or to a corporation which has no existence, is void.[6] Or, if the deed itself raises an uncertainty as to the party intended, it will be void. But there is an important difference between a description of a grantee in a deed which is inherently uncertain and indeterminate and one which is merely imperfect, and capable, on that account, of different applications—extrinsic evidence is not admissible, in the former case, to make the conveyance effectual in favor of any particular person, while in the latter case a resort to

[1] Elliott v. Sleeper, 2 N. H. 525.

[2] Catlin v. Ware, 9 Mass. 218; Peabody v. Hewett, 52 Me. 33.

[3] Agricultural Bank v. Rice, 4 How. 225. See also Harrison v. Simons, 55 Ala. 510; Chapman v. Crooks, 41 Mich. 595. Saunders v. Hackney, 19 Lea (Tenn.), 194; Adams v. Medsker, 25 W. Va. 127; Gaston v. Weir (Ala.), 4 South. Rep. 258.

[4] Natchez v. Minor, 17 Miss. 544; Jackson v. Corey, 8 Johns. 388; German Association v. Scholler, 10 Minn. 331; Hornbeck v. Westbrook, 9 Johns. 73. But see Judd v. Woodruff, 2 Root (Conn.), 298.

[5] Lillard v. Ruckers, 9 Yerg. 64; Muskingum Turnpike v. Ward, 13 Ohio, 120. A patent issued to a person not in existence is a nullity, but one issued to a person under an assumed name is not void, and a transfer by such person under his assumed name will give title. Thomas v. Wyatt, 31 Mo. 188.

[6] Douthitt v. Stinson, 63 Mo. 268.

extraneous facts and circumstances may become necessary, and is proper, in order to ascertain the individual to whom the description was intended to apply.[1] Where the description in a deed suits two persons, it is incumbent upon the one claiming under the deed to show that he is the one intended.[2] When a corporation is a party to a deed, a mistake in setting out its name will not vitiate the deed if it is apparent from the face of it that the corporation was intended thereby.[3]

§ 70. **Illustrations.**—In the application of the foregoing principles it has been held that a grant to a person by his surname only, in the absence of other proof of his identity, would be void for uncertainty. In another case possession of the deed was considered sufficient to authorize proof *aliunde* as to the identity of the party, and it appearing that the Christian name of the grantee was left blank by mistake, and that the grantee, after delivery, inserted the Christian name of his wife, it was held that the title was in the husband.[4] A mistake in the Christian name is immaterial if, taking the deed as a whole, the party intended is ascertained.[5] The law knows but one Christian name, and the omission of the middle name or its initial does not affect a deed.[6] It may be added that a party who executes a deed in one name will not be permitted to take advantage of the fact that it is not his name.[7] Nor can a party avoid his

[1] Morse v. Carpenter, 19 Vt. 613; Aultman v. Richardson, 7 Neb. 1; Webb v. Den, 17 How. 579.

[2] Grand Gulf Banking Co. v. Bryan, 16 Miss. 234.

[3] Douglas v. Bank, 19 Ala. 659; Culpepper Society v. Digges, 6 Rand. 165; President v. Myers, 6 S. & R. 12; Society v. Varick, 13 Johns. 38; Aultman v. Richardson, 7 Neb. 1; Asheville Division v. Aston, 92 N. C. 578.

[4] Fletcher v. Mansur, 5 Ind. 267.

[5] Middleton v. Findla, 25 Cal. 81. See Boothroyd v. Engles, 23 Mich. 21; Merchants' Bank v. Spicer, 6 Wend. 446; Nixon v. Cobleigh, 52 Ill. 387; Wakefield v. Brown (Minn.), 37 N. W. Rep. 788.

[6] Dunn v. Games, 1 McLean, 321; Franklin v. Talmadge, 5 Johns. 84; Games v. Stiles, 14 Pet. 322; Erskine v. Davis, 25 Ill. 251; McDonald v. Morgan, 27 Tex. 503.

[7] Com. Dig., Fait. B. 1.

deed by reason of his name being misspelled—proof of its execution by him is sufficient.[1] A deed to a partnership, in the company name, in which only the surnames of a part of the company are mentioned, they being well known members, cannot take as grantees; but those named can and will hold in trust for themselves and their associates.[2] Yet it has been held that a deed made to a firm by name, without naming any individual members of the firm, is not for that reason void, but may be explained by parol.[3] A deed from L., senior, to the "heirs of L., junior, in consideration of the natural love and affection for his grandchildren," L., junior, being alive at the execution and delivery of the same, was held not void for uncertainty, as the word "grandchildren" shows that the word "heirs" is to be taken in its popular sense.[4] And where a deed was made to Louis S., no person of that name being known, and the circumstances clearly showed that the intended grantee was Arnold S., who had possession of the deed, it was held that title was in Arnold S., and that the ambiguity could be shown by parol.[5]

§ 71. **In every well-written Deed it is usual, after the Names, to add some Description of the Parties and the Character in which they Act.**—The occupation, place of residence and matters of that character, are often of great assistance in identifying the parties intended, or directing where they may be found in the event that an inquiry is to be made of them. Where the parties act as trustees, guardians or executors, this fact should always be stated. Where such a deed does not in apt words convey the land as that of the real party in interest, though signed by the trustee, executor or guardian, and describing himself as such, it will be strictly construed as his own persona

[1] O'Meara v. North American, etc. Co., 2 Nev. 112.

[2] Beaman v. Whitney, 20 Me. 413. And see Arthur v. Weston, 22 Mo 378; McCauley v. Fulton, 44 Cal. 355.

[3] Murray v. Blackledge, 71 N. C. 492.

[4] Huss v. Stephens, 51 Pa. St. 282.

[5] Stack v. Sigelkow, 12 Wis. 234.

deed.[1] It was also held that where an heir at law undertakes to convey the inherited land, and in one part of the deed describes himself as agent for the heirs of the deceased, but in all other parts of the deed speaks of himself as the granting party, and executes the deed in his own name, the deed should be admitted in evidence as his own deed.[2] But where the party is sufficiently identified without the description, and the latter is incorrect, it will be rejected as surplusage.[3]

ARTICLE IV.

OF THE RECITALS.

SECTION.

73. The purpose of the recitals.
74. Effect of recitals as notice.

§ 73. **The Purpose of the Recitals.**—In well drawn deeds, such facts as the death of a former owner and the succession of an heir, the survivorship of a joint tenant, or the happening of any contingency upon which one estate is to determine and another take effect, and like circumstances which keep up the connection in the chain of title, are uniformly recited Such facts are frequently of the first and most essential importance, and without these recitals the title would appear defective. It is to be remembered, however, that recitals are not evidence of the fact, when the fact requires proof,[4] unless made so by statute,[5]

[1] Bobb v. Barnum, 59 Mo. 394.

[2] Endsley v. Strock, 50 Mo. 508.

[3] Jackson v. Root, 18 Johns. 59; Jackson v. Clark, 7 Johns. 217.

[4] Watson v. Gregg, 10 Watts, 289.

[5] Under the statutes of Missouri the recital that a deed is executed by the grantor as administrator, is evidence of his appointment as administrator. Johnson v. Beazley, 65 Mo. 250; Rev. Stat., Vol. 1, § 172. In

though any person, being a party to the deed, and who gives this history of the title, would be estopped from denying it,[1] as against one who has acted upon the faith of such representations.[2]

Recitals are usually relied upon as affording a reasonable presumption of the correctness of the statement, especially when found in ancient deeds.[3] And, it may be added, that they are usually deemed satisfactory, except in peculiar circumstances which call for more than ordinary caution. But a recital in a deed, that it is made at the request and by consent of certain persons, does not pass any legal title they may have in the premises, even though they also sign the deed.[4]

§ 74. **The Recitals are Often of Great Importance as**

Georgia by statute a recital in deed of receipt of purchase money does not estop the maker from proving the contrary. Georgia Code 1882, § 2698. By statute in California and Dakota, if the operative words of a grant are doubtful, recourse may be had to its recital to assist the construction. California Code 1876, § 6068; Dakota Civ. Code, § 614.

[1] Clark v. Baker, 14 Cal. 629; Douglas v. Scott, 5 Ohio, 199; Stow v. Wyse, 7 Conn. 314; Van Rensselaer v. Kearney, 11 How. 322; Green v. Clark, 13 Vt. 158; Goodtitle v. Bailey, Cowp. 597; Bensley v. Burden, 2 Sim. & S. 524; Marchant v. Errington, 8 Scott, 210; Penrose v. Griffith, 4 Binn. 231. In most of these cases the question arose as to the effect of recitals by the grantor of the particular estate he claimed to own when there were no covenants in the deed. In Van Rensselaer v. Kearney, *supra*, Mr. Justice Nelson says: "The principle deducible from these authorities seem to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth, on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seized and possessed at the time he made the conveyance."

[2] Carver v. Jackson, 4 Pet. 85; Hall v. Orvis, 35 Iowa, 366. A stranger to the deed can never set up the recitals therein, by way of estoppel, as against a party to the deed. Allen v. Allen, 45 Pa. St. 473. See Sunderlin v. Struthers, 47 Pa. St. 423; Whitaker v. Garnett, 3 Bush, 402; Robbins v. McMillan, 26 Miss. 434.

[3] Hunt v. Johnson, 19 N. Y. 279.

[4] Chapman v. Crooks, 41 Mich. 595.

Giving Notice of Some Dormant Title or Claim Against the Property.—It is a general rule that a man is regarded as notified of whatever appears in the instruments which constitute his chain of title,[1] and is bound by recitals adverse to him.[2] Whether he actually reads them or not, he is equally chargeable with notice of their contents. And whatever is sufficient to put him on inquiry, is sufficient to charge him with notice of whatever an ordinarily diligent search would have disclosed.[3] Therefore, in the examination of titles, all deeds referred to, on which the title is based, must be examined as to any facts which they may contain, at the purchaser's peril; for he will take subject to the rights under them, of which he is constructively notified.

The effect of a recital in the deed by which a party purchases is illustrated in the case of a grantee who has gone in under a conveyance reciting a previous mortgage to other persons, and has received credit on his purchase for the amount of such mortgage; in which case it has been held in a foreclosure suit, brought by the mortgagor, that the purchaser will not be allowed to question the validity of the mortgage, even though it be absolutely void.[4]

[1] Pringle v. Dunn, 37 Wis. 450; Brush v. Ware, 15 Pet. 93; Reeder v. Barr, 4 Ohio, 446; Jackson v. Neely, 10 Johns. 373; Gibert v. Peteler, 38 Barb. 488; Jacques v. Short, 20 Barb. 269; Sigourney v. Munn, 7 Conn. 324; Anderson v. Layton, 3 Bush (Ky), 87.

[2] Rankin v. Warner, 2 Lea (Tenn.) 302; Robertson v. McAfee, 50 Tex. 317; Lamar v. Turner, 48 Ga. 329. Recitals bind both parties and those claiming under them. Fisk v. Flores, 43 Tex. 340.

[3] Greenl. Cruise Dig. 452, n; Acer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Hamilton v. Nutt, 34 Conn. 501; Baker v. Matcher, 25 Mich. 53; Ware v. Egmont, 31 Eng. L. & Eq. 89; Mosle v. Kuhlman, 40 Iowa, 108. See, as to limitations of this rule, Acer v. Westcott, 46 N. Y. 384; Jones v. Smith, 1 Hare, 43; Hiern v. Mill, 13 Ves. 120; West v. Reed, 2 Hare, 260; Ware v. Egmont, *supra;* Bower v. McCormick, 23 Gratt. 310; *infra*, Chapter IV, Art. II.

[4] Sands v. Church, 6 N. Y. 347; Murray v. Judson, 9 N. Y. 73; Hartley v. Harrison, 24 N. Y. 270; Lee v. Newman, 55 Miss. 365. And see Crofut v. Wood, 6 N. Y. (Sup. Ct.) 314.

ARTICLE V.

THE CONSIDERATION.

SECTION.

76. Considerations are of two kinds—good and valuable.
77. Consideration not essential at common law.
78. Necessary to a bargain and sale or covenant to stand seized.
79. Amount actually paid may be proved, when.

§ 76. **Considerations are of two Kinds, namely, Good and Valuable.**—Good considerations are such as arise from an implied obligation. The love and affection subsisting between near relations, and the desire to provide for one's own family are frequently held to be good considerations.[1] Valuable considerations are either money or of money value.[2]

[1] As to what constitutes a good consideration, see Stovall v. Barnett, 4 Litt. 207; Hansen v. Buckner, 4 Dana (Ky.), 251; Wallis v. Wallis, 4 Mass. 135; Blackerby v. Holton, 5 Dana (Ky.), 520; Blount v. Blount, 2 L. R. (N. C.) 389; Bell v. Scammons, 15 N. H. 381; Stafford v. Stafford, 41 Tex. 111. As to whether support is a good consideration, see Jackson v. Florence, 16 Johns. 47, which holds that it is not. But *contra*, McGill v. Woodward, 1 Const. Rep. (S. C.) 468; Exum v. Canty, 34 Miss. 533; Spalding v. Hallenbeck, 30 Barb. 292; Hutchinson v. Hutchinson, 46 Me. 154; Shoots v. Brown, 27 Pa. St. 123. But such consideration avoids a deed at the instance of creditors. Henderson v. Hunton, 26 Gratt. 926.

[2] Marriage is a valuable consideration. But not if the deed be made to the wife after marriage, and not in pursuance of the marriage contract. Whelan v. Whelan, 3 Cow. 537; Verplank v. Sterry, 12 Johns. 536; Smith v. Allen, 5 Allen, 454. See also Thompson v. Thompson, 17 Ohio St. 649; Ellinger v. Crowl. 17 Md. 361. As to what has been held to constitute a valuable consideration under the particular facts in each case, see McWhorter v. Wright, 5 Ga. 555; Clark v. Troy, 20 Cal. 219; Borum v. King. 37 Ala. 606. As to land, Cheney v. Watkins, 1 Harr. & J. 527; Saunders v. Wagonseller, 19 Pa. St. 248; Gale v. Cobern, 18 Pick. 397. Precedent debt, McMahan v. Morrison, 16 Ind. 172; Swift v. Tyson, 16 Pet. 1; Busey v. Reese, 38 Md. 266; Young v. Ring, 1 T. B. Mon. 30; Wilson v. Russell, 13 Md. 494; Doe v. Horn, 1 Ind. 363; Peek v. Peek (Cal.), 19 Pac. Rep. 227. Agreement to pay indebtedness of grantees father, Tunison v. Chamblin, 88 Ill. 378. An agreement to do a thing is a sufficient consideration to support a deed, even though as a matter of fact the agreement

§ 77. **Not Essential at Common Law** —In reference to the legal effects of a deed in passing title, it was not deemed essential at common law that there should be any consideration.[1] In the absence of fraud upon the grantor or his creditor, a feoffment, or any properly common-law conveyance, is as effectual to pass the title, if a voluntary gift, as if made for a valuable consideration.[2] A man in unembarrassed circumstances may, if he pleases, give his property to a friend or stranger; and in the absence of fraud or imposition, the courts will not interfere with it. Thus it has been repeatedly held that a voluntary conveyance of land, without any consideration either good or valuable, is valid and binding between the parties and their privies,[3] in the absence of circumstances tending to show mental incapacity, mistake, fraud or undue influence.[4] In the case cited below, the court said: "As between the grantee and those who claim by inheritance from the grantor, in a deed when no creditor's rights are involved, it is unimportant whether a deed is given as a strictly business transaction to remunerate for or satisfy a distinct and settled obligation or partly from a desire to reward for long and meritorious service, and partly from a desire to testify regard and friendship."[5]

§ 78. **Necessary to a Deed of Bargain and Sale or Covenant to Stand Seized.**—In order that a deed may operate under the Statute of Uses, as a bargain and sale or covenant to stand seized, there must be either a valuable or a good consideration, or something equivalent thereto.[6] To sus-

is never performed. Gray v. Lake, 48 Iowa, 505; Winans v. Peebles, 31 Barb. 371; Lake v. Gray, 35 Iowa, 459.

[1] Cunningham v. Freeborn, 11 Wend. 248; Rogers v. Hillhouse, 3 Conn. 398.

[2] Perry v. Price, 1 Mo. 553; Den v. Hanks, 5 Ired. 30; *Ante*, § 56.

[3] Labaree v. Carlton, 53 Me. 211; Walker v. Walker, 13 Ired. 335; Fonty v. Fonty, 34 Ind. 435.

[4] Viney v. Abbott, 109 Mass. 301.

[5] Wallace v. Harris, 22 Mich. 380.

[6] Den v. Hanks, 5 Ired. 30; Lambert v. Smith, 9 Oreg. 185. See Manturn v. Seymour, 4 Johns. Ch. 497; Acker v. Phœnix, 4 Paige, 305. By

tain a deed of bargain and sale there must be a valuable consideration, expressed or proved;[1] while to give effect to a covenant to stand seized, requires a good consideration.[2] But it is not necessary that the consideration of blood or marriage should be expressed in the deed. It is sufficient that the consideration exists, and when it exists it may be averred in pleading and given in evidence.[3] So, a bargain and sale may be good although no pecuniary consideration be expressed in the deed.[4] In that case the consideration may be proved *aliunde*.[5] Any consideration, however slight, provided it be valuable and free from fraud, will support such a deed.[6] And so far as the legal effect of the deed is concerned, when a pecuniary consideration is expressed, (except as against creditors and others impeaching it for fraud), the language of the deed is conclusive.[7] And it is

statute in Georgia must be a good or valuable consideration, and the consideration may always be inquired into. Ga. Code 1882, § 2690.

[1] Jackson v. Florence, 16 Johns. 46; White v. Weeks, 1 P. & W. 486; Boardman v. Dean, 34 Pa. St. 252; Gault v. Hall, 26 Me. 561; Jackson v. Delancy, 4 Cow. 427; Johnson v. Siebring, 16 Johns. 515. A meritorious consideration not sufficient. Wilber v. Est. Warren, (N. Y.) 10 N. E. Rep. 263.

[2] Rollins v. Riley, 44 N. H. 11; Green v. Thomas, 11 Me. 321; Wallis v. Wallis, 4 Mass. 135. But, as we have seen, in a case in Massachusetts, the court, after discussing the reason of the rule which existed in England, that a consideration of blood or marriage is absolutely essential to the validity of a covenant to stand seized, held that "it was artificial and constructive, depending entirely upon the English Statute of Enrollments and having no pretext for continued existence where the provisions of that statute do not apply," and that the deed in that case might be maintained as a covenant to stand seized, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee. Trafton v. Hawes, 102 Mass. 533. And see Jackson v. Cadwell, 1 Cow. 639; Exum v. Canty, 34 Miss. 569; *Ante*, § 55.

[3] Brewer v. Hardy, 22 Pick. 380; Wallis v. Wallis, 4 Mass. 135; Gale v. Coburn, 18 Pick. 397.

[4] If in form a conveyance, it imports a consideration. Ruth v. Ford, 9 Kan. 17; Jackson v. Dillon, 2 Overt. 261. See Jackson v. Alexander, 3 Johns. 484.

[5] White v. Weeks, 1 P. & W. 486; Jackson v. Dillon, 2 Overt. 271; Den v. Hanks, 5 Ired. 30; Perry v. Price, 1 Mo. 553.

[6] *Ante*, § 56.

[7] Jones v. Dougherty, 10 Ga. 273; Hartshorn v. Day, 19 How. 211

immaterial whether a consideration expressed has or has not been paid,[1] except so far as they may be a lien for purchase-money, in case it has not been paid. But a covenant to stand seized will not be good from the mere circumstance that it professes to be made in consideration of natural love and affection, if there is no such relation existing between the parties as would constitute a good consideration.[2] It is to be remembered, however, that, although a deed intended to operate in a particular mode may be defective as a conveyance of that description, it may yet operate, by construction of law, in some other mode.[3] Thus, a deed intended as a bargain and sale may operate as a feoffment.[4] So, also, a deed of gift may be good as a feoffment without consideration.[5]

§ 79. **The Question as to how far the Consideration Expressed in a Deed is Open to Explanation or Contradiction,** and the various questions which usually arise under it, have been, both in England and this country, in a state of great confusion and much conflict,[6] the tendency of courts being to enlarge the power of explaining or varying a consideration expressed.[7] It may be stated as a deduction from the current of leading authorities that, although the acknowledgment of a consideration cannot be contradicted

Hatch v. Bates, 54 Me. 140; Rockwell v. Brown, 54 N. Y. 210; Trafton v. Hawes, 102 Mass. 541. See Kerr v. Birnie, 25 Ark. 225; Thompson v. Thompson, 9 Ind. 323; Randall v. Ghent, 19 Ind. 271; Hallocher v. Hallocher, 62 Mo. 267.

[1] Lake v. Gray, 35 Iowa, 461; Winans v. Peebles, 31 Barb. 371. But see Boardman v. Dean, 34 Pa. St. 252.

[2] 3 Prest. Abst. Tit. 14. A conveyance from a mother to an illegitimate child for "natural love and affection" sustained. Ivey v. Granberry, 66 N. C. 223. From the husband to the wife Stafford. v. Stafford, 41 Tex. 111. To a daughter-in-law, held not good. Jackson v. Caldwell, 1 Cow. 622.

[3] *Ante*, § 60, note 2.

[4] Cheney v. Watkins, 1 Harr. & J. 527.

[5] Den v. Hanks, 5 Ired. 30; Fouty v. Fouty, 34 Ind. 433.

[6] See the opinion of Cowen, J., in McCrea v. Purmort, 16 Wend. 473.

[7] Fontaine v. Boatman's Bank, 57 Mo. 553; Altringer v. Capehart, 68 Mo. 441; Kickland v. Menasha, etc. Co., (Wis.) 31 N. W. Rep. 471.

for the purpose of defeating or affecting the title conveyed,[1] it is always competent to prove by parol what the real consideration agreed upon was, in an action for the recovery of the purchase-money or upon the covenants.[2] The consideration stated and acknowledged in the deed, however, is presumed to be the true value agreed to be paid, until the contrary is proved,[3] though the amount named by the deed is only *prima facie* evidence of what was paid.[4]

[1] McCrea v. Purmort, 16 Wend. 460; Grout v. Townsend, 2 Hill, 554; Kinnebrew v. Kinnebrew, 35 Ala. 636; Irvine v. McKeon, 23 Cal. 475; Bullard v. Briggs, 7 Pick. 537; Coles v. Soulsby, 21 Cal. 47; Rockwell v. Brown, 54 N. Y. 213; Miller v. Edgerton (Kan.), 15 Pac. Rep. 894; Wilkinson v. Scott, 17 Mass. 257; Peck v. Vandenburg, 30 Cal. 23; Stackpole v. Robbins, 47 Barb. 212; Goodspeed v. Fuller, 46 Me. 141, and cases cited, *supra*, § 78. But a creditor or subsequent purchaser of the grantor may show that it was a mere gift. Peck v. Vandenburg, 30 Cal. 11; Johnson v. Taylor, 4 Dev. 355. A voluntary conveyance from husband to wife, without valuable consideration, is void as against creditors, even without proof of a fraudulent design. Fellows v. Smith, 40 Mich. 689. Conveyances of property, whether the consideration is adequate or inadequate, good or valuable, if made in good faith, are valid and operative as between the parties. But, as against the existing creditors of the grantor, they cannot be supported unless shown to have been founded on an adequate and valuable consideration. Hubbard v. Allen, 59 Ala. 296. See also Hamilton v. Blackwell, 60 Ala. 545.

[2] Rhine v. Ellen, 36 Cal. 362; Hannan v. Oxley, 23 Wis. 519; Rabsuhl v. Lack, 35 Mo. 316; Lawton v. Buckingham, 15 Iowa, 22; Drury v. Tremont, etc. Co., 13 Allen, 171; Morris Canal v. Ryerson, 3 Dutch. 467; Paige v. Sherman, 6 Gray, 511; Harper v. Perry, 28 Iowa, 63; Pierce v. Brew, 43 Vt. 295; Miller v. Goodwin, 8 Gray, 542; Penn. Manf. Co. v. Neel, 54 Pa. St. 9; Hubbard v. Allen, 59 Ala. 283; Huebsch v. Scheel, 81 Ill. 281; Wood v. Moriarty (R. I.), 9 Atl. Rep. 427; Hays v. Peck, 107 Ind. 389. But *contra*, in North Carolina. Brocket v. Foscue, 1 Hawk. 64; Mendenhall v. Parish, 8 Jones L. 106; Lowe v. Weatherley, 4 Dev. & B. 212.

[3] Belden v. Seymour, 8 Conn. 310; Clements v. Landrum, 26 Ga. 401; Bayliss v. Williams, 6 Coldw. (Tenn.) 140; Barter v. Greenleaf, 65 Me. 105.

[4] Meeker v. Meeker, 16 Conn. 383; Pierce v. Brew, 43 Vt. 295; Rabsuhl v. Lack, 35 Mo. 316; Dooper v. Noelke, 5 Daly, 413; Reynolds v. Vilas, 8 Wis. 471; Bonner v. Metcalf, 58 Ga. 236; Beach v. Packard, 10 Vt. 96.

ARTICLE VI.

THE GRANTING CLAUSE.

SECTION.

82. There must be words showing an intention to convey.
83. No particular form of words necessary.
84. Covenants implied by words of grant.
85. As to words of limitation or inheritance.

§ 82. **In Order that a Deed may be Effective,** it must contain sufficient words showing an intention to convey an estate. For example, where the only words indicating such intent were "sign over," it was held not operative as a grant.[1]

§ 83. **It was once Considered Important for the Words of Grant to Correspond with the Nature of the Deed.**— Thus, the proper words for a feoffment are said to be, "give," "grant," "enfeoff," etc.; and for a bargain and sale, "grant," "bargain" and "sell."[2] But such words are not now essential to the operation of a deed, either as a feoffment or bargain and sale, if there be other words of equivalent significance which show the intention of the parties. The words "I have given and granted" may, by construction, amount to a grant, a feoffment, a gift, a lease or release, a confirmation or surrender; and it is in the election of the party to whom the deed is made, to use it to which of these purposes he will.[3] Any words which show

[1] McKinney v. Settles, 31 Mo. 541. And see Hummelman v. Mounts, 87 Ind. 178. Notwithstanding Ala. Code, § 2948, an instrument in form of a deed, signed, sealed, acknowledged and having *habendum* clause, but containing no words of grant or transfer, cannot operate as a conveyance. Webb v. Mullins, 78 Ala. 111. Where the granting clause conveys a fee-simple, with nothing to indicate that the grantor intended such clause to be limited by the *habendum*, which conveys only a life estate, the grantee will take an absolute title unrestricted by the *habendum*. Ratliffe v. Mars (Ky.), 7 S. W. Rep. 395.

[2] 1 Wood on Conv., 203.

[3] Rowe v. Beckett, 30 Ind. 154. And see Folk v. Varn, 9 Rich. Eq. 303; Patterson v. Carneal, 3 A. K. Marsh. 619.

an intention to transfer an estate or to exercise a power will be allowed to have the operation which will make them effectual, if the other circumstances concur which are by law required to the operation of the deed in this form.[1] The rule propounded by Shepherd in his Touchstone is, that the construction be such as the whole deed, and every part of it, may take effect; and as much effect as may be for that purpose for which it is made; so as when it cannot take effect according to the letter, it be construed so as it may take some effect or other.[2]

§ 84. **Covenants Implied by Words of Grant.** — At common law the words "give" and "grant" were, in some cases, construed into covenants of warranty;[3] and in several of the States, the words "grant, bargain and sell" are, by statute, made to imply certain express covenants.[4] On the creation of an estate less than a freehold, a covenant for title was, from an early period, implied from the words of leasing, as "grant," "demise," etc.[5] It has been held in some cases,[6] and denied in others,[7] that the word "lease"

[1] 3 Prest. Abst. Tit. 21; Pierson v. Armstrong, 1 Iowa, 282; Jackson v. Alexander, 3 Johns. 484. Under Ala. Code 1876, § 2948, any instrument in writing, signed by the grantor or his agent, having a written authority with or without a seal, is effectual to transfer the legal title to the grantee if such was the intention of the grantor to be collected from the entire instrument. Tatum v. Tatum, 1 South. Rep. 195.

[2] Shep. Touch. 82, 222; Jennings v. Brizeadine, 14 Mo. 332; Lynch v. Livingston, 8 Barb. 483, 485; Marden v. Chase, 32 Me. 329; Collins v. Lavelle, 44 Vt. 230; Wilcoxen v. Clark, 51 Cal. 640. In California and Dakota by statute, if the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction. Cal. Code 1876, § 6068; Dak. Civ. Code, § 614. And in many of the States the term "heirs" or other words of inheritance is not necessary to create an estate in fee, unless the intent to convey less appears in express terms. Stimson's Amer. Stat., § 1474. In Maryland words "grant, bargain and sell" are sufficient to convey whole estate. Rev. Code 1878, Art. 44, § 5.

[3] Rawle on Cov., 4th ed., 457; Dow v. Lewis, 4 Gray, 473. But see Webster v. Conley, 46 Ill. 14.

[4] Blossom v. Van Court, 34 Mo. 319; Hawk v. McCullough, 21 Ill. 220; *infra*, Art. XII. But see Frost v. Raymond, 2 Caines, 188.

[5] Rawle on Cov., 4th ed., 461.

[6] Maule v. Ashmead, 20 Pa. St. 482; Ross v. Dysart, 33 Pa. St. 452; Hamilton v. Wright, 28 Mo. 199, Scott, J., dissenting.

[7] Lovering v. Lovering, 13 N. H. 513. See Hart v. Windsor, 12 Mees.

is equivalent to "demise" in creating an implied covenant. This subject, so far as respects the covenants implied, will more properly be treated of under the head of covenants.

§ 85. **Words of Limitation or Inheritance.**—At common law words of grant to a man, without words of limitation or inheritance, were understood to create in him only a life estate; and the word "heirs" was indispensable to create an estate of inheritance.[1] But this rule has been abrogated by statute in most of the States.[2]

ARTICLE VII.

THE DESCRIPTION OF THE PREMISES.

SECTION.

87. Description must afford sufficient means of identifying the land.
88. Parol evidence admissible, when.
89. Deed may be reformed, when.
90. When resort is to be had to rules of construction.
91. Reference to condition of property at time of the conveyance.
92. Contemporaneous writings.
93. A grant of the principal passes the incident.
94. A grant in general terms passes all of the constituent parts of the thing granted.
95. All parts of a deed to be construed together.

& W. 85; Sheets v. Selden, 7 Wall. 423; Kinney v. Watts, 14 Wend. 38; Tone v. Brace, 8 Paige Ch. 597; Williams v. Burrell, 1 C. B. 429; Platt on Conv. 47; Mayor v. Mabie, 13 N. Y. 160.

[1] Nicholson v. Caress, 59 Ind. 39; Young v. Marshall, Hill & D. (N. Y. Sup. Ct.) 93; Jordan v. McClure, 85 Pa. St. 495; Roberts v. Forsythe, 3 Dev. 26; Leitensdorfer v. Delphy, 15 Mo. 161; Buffum v. Hutchinson, 1 Allen, 58. But see Calmes v. Buck, 4 Bibb, 453.

[2] Hawkins v. Chapman, 36 Md. 83; Cromwell v. Winchester, 2 Head. 389; Jordan v. McClure, 85 Pa. St. 496; Mackall v. Richards, 1 Mackay (D. C.), 444. But *contra*, Batcheler v. Whitaker, 88 N. C. 350. Where in a deed the words "children" and "heirs" are used indiscriminately in order to harmonize the two parts of the deed, the word "children" will be substituted for the word "heirs" in the *habendum*. Warn v. Brown, 102 Pa. St. 347. And see See v. Derr, 57 Mich. 369.

96. False surplusage of description.
97. Where there are two descriptions the one most definite will control.
98. The grammatical sense not always adhered to.
99. All instruments construed *contra proferentem*.
100. Construction always favorable to the purpose of the deed.
101. Monuments control courses and distances.
102. Establishment of boundary line by adjoining proprietors.
103. Reputation admissible, when.
104. A grant bounded on a stream or highway goes to the center.
105. As to lands bounded by large bodies of water.
106. The quantity of land mentioned.
107. The words "more or less."
108. Reference to a map, survey or another description has the effect to incorporate in the deed.
109. Exceptions.

§ 87. **The Description Must Afford Sufficient Means of Identifying the Land.**—The general rule is that if the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, this is sufficient to sustain the conveyance, notwithstanding there may be errors or inconsistency in some of the particulars.[1] But if, taking the instrument as a whole, the subject of the grant cannot be ascertained, the deed will be void.[2] And here the rule *id certum est quod certum reddi potest* is again applicable.[3] If the description is ambiguous, the true location of the premises described

[1] Vose v. Bradstreet, 27 Me. 156; Bosworth v. Sturtevant, 2 Cush. 392; Lyman v. Loomis, 5 N. H. 408; Mason v. White, 11 Barb. 173; Eggleston v. Bradford, 10 Ohio, 312; Andrews v. Murphy, 12 Ga. 431; Berry v. Wright, 14 Tex. 270; Andrews v. Pearson, 68 Me. 19; Farris v. Gilbert, 50 Tex. 350.

[2] Campbell v. Johnson, 14 Mo. 247; 1 Wood on Conv. 206; Wofford v. McKinna, 23 Tex. 41; Boardman v. Read, 6 Pet. 328. In order that the record of a deed may impart notice to subsequent purchasers, the description of the land conveyed should be such that it can be identified by name, location, monuments, courses and distances or numbers, or the deed should refer to some other instrument lawfully on record which does contain such means of identification. Gatewood v. House, 65 Mo. 663.

[3] "That is certain which may be made certain." 2 Bl. Com. 143; 4 Kent's Com. 462; Miller v. Mann, 55 Vt. 475; Travellers' Ins. Co. v. Yount, 98 Ind. 454.

in the deed may be ascertained from its references, monuments, and the whole description; and circumstances extrinsic from the deed are admissible.[1]

§ 88. **Parol Evidence may be Resorted to in Explanation of a Description to show** the circumstances under which the deed was made,[2] to show the meaning of technical terms of art,[3] or to show and explain latent ambiguities,[4] but will not be admitted to contradict or control the language of the deed.[5] Thus, for instance, where the location of the land is clearly ascertained by a sufficient description admitting of but one construction, it cannot be controlled by evidence of intent or acts and declarations of the parties tending to establish a different location or another designation.[6] Or if the land is so inaccurately described as to render its identity wholly uncertain, the grant is void and cannot be explained by parol evidence so as to render the instrument effective.[7] But to have this effect the ambiguity must be *patent* upon the face of the instrument; in which case the

[1] Fuller v. Carr, 33 N. J. L. 157; Putzel v. Van Brunt, 40 N. Y. Sup. Ct. 501; See 1 Greenl. on Ev., §§ 295, 298.

[2] 1 Greenl. on Ev., §§ 295, 298; Hutchins v. Dixon, 11 Md. 29; Stanley v. Greene, 12 Cal. 148; Abbott v. Abbott, 53 Me. 356.

[3] Eaton v. Smith, 20 Pick. 150; N. J. Zinc Co. v. Boston Franklinite Co., 15 N. J. Eq. 418.

[4] Hall v. Davis, 36 N. H. 569; Clark v. Powers, 45 Ill. 283; Wofford v. McKinna, 23 Tex. 44; Bybee v. Hageman, 66 Ill. 519. The omission from the description of the name of the town, county or State, is a latent ambiguity, explainable by extrinsic evidence. Bybee v. Hageman, 66 Ill. 519; Beal v. Blair, 33 Iowa, 318; Austrian v. Davidson, 21 Minn. 117; Lloyd v. Bunce, 41 Iowa, 660; Billings v. Kankakee Coal Co., 67 Ill. 489.

[5] Means v. Presbyterian Church, 3 Watts & S. (Pa.) 303; Hall v. Davis, 36 N. H. 569; Stowell v. Bonswell, 135 Mass. 340. But see Charles v. Patch, 87 Mo. 450. Parol evidence to show intention that the description in deed should be read in reverse order not admissible. Gillespie v. Sawyer, 15 Neb. 536.

[6] Jennings v. Brizeadine, 44 Mo. 332; Jackson v. Perrine, 35 N. J. L. 137; McAfferty v. Conover, 7 Ohio St. 99; Weill v. Lucerne Mining Co., 11 Nev. 200.

[7] Campbell v. Johnson, 44 Mo. 247.

proper course is first to have the deed reformed and the error corrected.[1]

§ 89. **Reforming a Deed.**—In general, a deed may be reformed and made to conform to the original intention of the parties when, by mistake, it has been so worded as to convey a different estate from that which the parties intended.[2] In all such cases the error complained of must have been the result of accident, mistake or fraud, and not the agreement of the parties to omit a part of the stipulation of contract.[3] If any intermediate owner has taken the estate without notice, he, and those claiming under him, would have a right to stand upon the title as it appears upon the deed.[4]

§ 90. **When Resort is to be had to Rules of Construction.**—In construing a deed the court places itself as nearly as possible in the situation of the parties; and their intention is to be deduced from the instrument of conveyance, as in the case of any other contract.[5] If the intent is not then apparent, resort is to be had to the rules of construction, which give greater effect to those things about which the law presumes the parties are the least liable to make a mistake. But arbitrary rules are not to be invoked if the intention of the parties can be plainly discovered without their aid.[6] No rules for the location of land described in a

[1] Jennings v. Brizeadine, 44 Mo. 332; Fenwick v. Floyd, 1 Har. & G. 172; Deery v. Gray, 10 Wall. 270; Thomas v. Turvey, 1 Har. & G. 437; Peck v. Mallams, 10 N. Y. 532; Boardman v. Read, 6 Pet. 345; Hill v. Mowry, 6 Gray, 551; Andrews v. Todd, 50 N. H. 565. But see Cramer v. Benton, 60 Barb. 225.

[2] Huss v. Morris, 63 Pa. St. 372; Canedy v. Marcy, 13 Gray, 373; Wyche v. Greene, 16 Ga. 49; Adams v. Stevens, 49 Me. 362.

[3] Story on Eq., § 154.

[4] Prescott v. Hawkins, 16 N. H. 122; Varick v. Briggs, 6 Paige, 323.

[5] Long v. Wagoner, 17 Mo. 178; Stanley v. Greene, 12 Cal. 148. Provided by statute in some States that every conveyance is to be construed so as to carry into effect the intent of the parties. Stimson's Amer. Stat., § 1475. In others it is laid down what every deed conveying land is construed to include. *Ibid.* § 1475 D.

[6] Indeed, the very idea and purpose of construction implies a previous uncertainty as to the meaning of the contract; for, where this is clear

deed can be laid down, which are not subject to an infinite variety of exceptions arising out of matters of evidence.[1] Consequently only a few of the leading ones will be mentioned.

§ 91. **A Deed is to be Construed, in all its Parts, with Reference to the Actual Rightful State of the Property at the Time of the Conveyance,** unless some other time is expressly referred to.[2] The parties are supposed to contract with reference to the property in the condition it was at the time; and, therefore, resort is to be had to these circumstances in explanation of their meaning.

§ 92. **Contemporaneous Writings.**—The intention of the parties is to be ascertained, not only by the language of the description in the deed itself, but by reference to extrinsic facts, which may consist of contemporaneous writings relating to the same subject, or prior deeds through which the title has come down and writings contemporaneous therewith, and circumstances relating to the premises described in them.[3] The maxim is *contemporanea expositio est optima et fortissima in lege*[4] (a contemporaneous exposition is the best and most powerful in law).

§ 93. **A Grant of the Principal Passes the Incident.**—Another maxim resorted to in the construction of deeds is, *cuicunque aliquis quid concedit, concedere videtur, et id sine quo res upso esse non potuit* (whoever grants a thing, is supposed also to grant that without which the grant itself would be of no effect);[5] the application of which is, that property conveyed passes with it all incidents rightfully belonging to it at the time of the conveyance, so far as they

and unambiguous, there is no room for construction, and nothing for construction to do. Kimball v. Semple, 25 Cal. 449.

[1] Bradford v. Pitts, 2 Const. (S. C.) 115.

[2] Dunklee v. Wilton R. R. Co., 24 N. H. 489; Commonwealth v. Roxbury, 9 Gray, 493; Abbott v. Abbott, 51 Me. 581; Richardson v. Palmer, 38 N. H. 218; Karmuller v. Krotz, 18 Iowa, 356; Lane v. Thompson, 43 N. H. 324; Moore v. Griffin, 22 Me. 350.

[3] Putzel v. Van Brunt, 40 N. Y. Sup. Ct. 501; Winnipisseogee v. Perley, 44 N. H. 83.

[4] Coke (2d Inst.), 11; Connery v. Brooke, 73 Pa. St. 84.

[5] Co. Litt. 56*a*; Shep. Touch. 89.

are necessary to the full benefit and perfect enjoyment of the property, without any specification of them.[1] Thus, if land be granted, surrounded by other lands of the grantor, a right of way to the granted premises will go with the grant.[2] It must, however, be strictly a way of necessity, and not a mere convenience,[3] unless it is an existing way, in which case it may pass as an appurtenant easement.[4]

§ 94. **Where the Grant is in General Terms, Whatever Belongs to the Thing Granted, as a Constituent Part or Element, Passes with It.**—Upon this principle, the grant of a house passes its doors, windows, locks, keys, window-blinds and the like, although at the time of the conveyance they may have been severed from the building for a temporary purpose.[5]

§ 95. **All the Parts of a Deed are to be Considered and Construed Together,** and every part should, if possible, be made to take effect and every word to operate, if by law it may, according to the intention of the parties, so that no part shall be rejected.[6] Yet, if inconsistent or repugnant to the remainder of the description and enough still remains to ascertain the land with certainty, a call may be rejected.[7]

§ 96. **False Surplusage of Description.**—If there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not vitiate the grant. But when the description of the estate intended to be con-

[1] Dunklee v. Wilton R. R. Co., 24 N. H. 489; Murphy v. Campbell, 4 Pa. St. 480; Eliott v. Carter, 12 Pick. 436; Polden v. Bastard, 4 B. & S. 258; Wilson v. Hunter, 14 Wis. 684.

[2] Collins v. Prentice, 15 Conn. 39.

[3] Nichols v. Luce, 24 Pick. 102.

[4] Kent v. Waite, 10 Pick. 138; Murphy v. Campbell, 4 Pa. St. 484; Harris v. Elliott, 10 Pet. 25, 54; Pope v. O'Hara, 48 N. Y. 455.

[5] Shep. Touch. 90; Farrer v. Stackpole, 6 Me. 154.

[6] Watters v. Bredin, 70 Pa. St. 238; Herrick v. Hopkins, 23 Me. 217; Richardson v. Palmer, 38 N. H. 212; Thrall v. Newell, 19 Vt. 202; Byrd v. Ludlow, 77 Va. 483; Wharton v. Brick (N. J.), 8 Atl. Rep. 529.

[7] Cooley v. Warren, 53 Mo. 166; Shewalter v. Pirner, 55 Mo. 218.

veyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every part of the description.[1]

§ 97. **Where in a Deed there are Two Descriptions of the Premises Conveyed,** and there is a clear repugnance between them, the court will look into the surrounding facts and give effect to the description which is the most definite and certain, and which will carry out the evident intention of the parties.[2]

§ 98. **The Grammatical Sense** is not adhered to in construing a deed where a contrary intent is apparent.[3] Generally, all relative words are read as referring to the nearest antecedent. But this rule of grammar is not a rule of law, where the whole instrument shows plainly that a reference to an earlier antecedent was intended.[4] In general, no regard is had to punctuation;[5] but it will be resorted to to settle the meaning of an instrument after all other means have failed.[6]

§ 99. **All Instruments are to be Construed "Contra Proferentem."**—That is, against him who gives or undertakes, or enters into an obligation.[7] Accordingly, it is said that the construction of a deed is to be favorable to the

[1] *Ibid;* Jackson v. Clark, 7 Johns. 223; Peck v. Mallows, 10 N. Y. 533; Kruse v. Wilson, 79 Ill. 235.

[2] Wade v. Deray, 50 Cal. 376; Raymond v. Coffey, 5 Oreg. 132; Driscall v. Green, 59 N. H. 101. A particular description will control a general one where they are repugnant. H. & St. Jo. R. R. Co. v. Green, 68 Mo. 169. And see Brunswick Sav. Inst. v. Crossman, 76 Me. 577.

[3] Jackson v. Topping, 1 Wend. 388; Hancock v. Watson, 18 Cal. 137.

[4] Staniland v. Hopkins, 9 Mees. & W. 178, 192; Gray v. Clark, 11 Vt. 583.

[5] Williams on Real Prop. 161.

[6] Ewing v. Burnett, 11 Pet. 41. Where the closing clause in a description sums up the intention as to the particular premises conveyed, it has a controlling effect upon all the prior phrases used in the description. Ousby v. Jones, 73 N. Y. 621.

[7] Barrett v. Duke of Bedford, 8 T. R. 605. And see Johnson County v. Wood, 84 Mo. 489.

grantee.[1] But this rule is of little value, and the last to be resorted to.[2] It is not properly applicable to any case except one of strict *equivocation*, where the words used will bear two or more interpretations equally well.[3]

§ 100. **Construction Always Favorable to the Purpose of the Deed.**—It is a general and well established rule, that a construction which renders an instrument operative and valid is to be adopted in preference to one which makes it void;[4] and that construction which will give the instrument the greatest effect toward the accomplishment of the purpose for which it was made, is to be preferred to one which would tend to frustrate that purpose.[5]

§ 101. **Monuments Control Courses and Distances.**—In identifying a boundary line it is a general rule, that fixed and known monuments called for in a description must prevail over courses and distances.[6] But if there is no description less liable to mistake, courses and distances will control.[7]

[1] Charles River Bridge v. Warren Bridge, 11 Pet. 589; Cocheco Manuf. Co. v. Whittier, 10 N. H. 305; Winslow v. Patten, 34 Me. 25; Mills v. Catlin, 22 Vt. 99.

[2] Boe. Max. Rep. 3.

[3] Adams v. Warner, 23 Vt. 411, 412.

[4] Anderson v. Baughman, 7 Mich. 69; Hoffman v. Mackall, 5 Ohio St. 123; Gans v. Aldridge, 27 Ind. 294.

[5] A construction which requires that an entire clause of a deed should be rejected, will be adopted only from unavoidable necessity. City of Alton v. Illinois Transportation Co., 12 Ill. 38.

[6] Daggett v. Willey, 6 Florida, 482; Brown v. Huger, 21 How. 305; Haynes v. Young, 36 Maine, 557; Coles v. Wooding, 2 P. & H. (Va.) 189; Kronenberger v. Hoffner, 44 Mo. 185; Kellogg v. Mullen, 45 Mo. 571; Walsh v. Hill, 38 Cal. 481; Keenan v. Cavanaugh, 44 Vt. 268; West v. Shaw, 67 N. C. 494; Welder v. Hunt, 34 Tex. 44; Thompson v. Wilcox, 7 Lans. (N. Y.) 376; Lewis v. Lewis, 4 Oreg. 177; Morse v. Rogers, 118 Mass. 572; Cunningham v. Curtis, 57 N. H. 157; Simonton v. Thompson, 55 Ind. 87; Harris v. Hull, 70 Ga. 831; Adams v. Alkire, 20 W. Va. 480. The marks on the ground constitute the actual survey of a tract of land: the draft of it is but evidence of the survey and will be controlled by them; courses and distances must yield to marks and calls. Riddlesburg, etc. Coal Co. v. Rogers, 65 Pa. St. 416; Marsh v. Mitchell, 25 Wis. 706. See Kronenberger v. Hoffner, 44 Mo. 185; Putnam v. Bond, 100 Mass. 58; Watson v. Jones, 85 Pa. St. 117.

[7] Higinbotham v. Stoddard, 72 N. Y. 94; Kissam v. Gaylord, Busb.

And where it appears by a deed that the courses and distances from a fixed and determinate line were intended to control instead of monuments referred to, the latter will be disregarded.[1] So, when monuments referred to in a description are not found, and their location cannot be ascertained, the course and distances, when explicit, must govern, and cannot be controlled or affected by parol evidence.[2] It has also been held that the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced when the instrument would be thereby defeated, and when the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land.[3]

§ 102. **Adjoining Proprietors** may establish a division line by parol agreement, and such agreement, when executed, will generally be held conclusive upon the parties and all claiming under them.[4] But if mistakenly located and agreed on, such line will not be held binding if no injustice would be done by disregarding it.[5] When a boundary is indefinite and uncertain, if run out and marked by the owner, it will be presumed, as against him, that it was correctly done. This presumption, however, may be removed by proof of a mistake, and that the line as marked varies materially from the true line.[6] Though it has been held that, where a deed of land refers to a monument not actu-

(N. C.) L. 116. Where no monuments are mentioned, or if mentioned their existence and location are not proved, courses and distances will govern. Bagley v. Morrill, 46 Vt. 94.

[1] Buffalo R. R. Co. v. Stigeler, 61 N. Y. 348; Higinbotham v. Stoddard, 72 N. Y. 94; Hall v. Eaton, 139 Mass. 217; Danziger v. Boyd, 53 N. Y. Super. Ct. 398.

[2] Drew v. Swift, 46 N. Y. 204. And see Wilson v. Hildreth, 118 Mass. 578; Bagley v. Morrill, 46 Vt. 94.

[3] White v. Luning, 93 U. S. 515.

[4] Cutler v. Callison, 72 Ill. 113; Orr v. Hadley, 36 N. H. 575; Houston v. Sneed, 15 Tex. 307; Bolton v. Lann, 16 Tex. 96; Ebert v. Wood, 1 Binn. 216; McNamara v. Seaton, 82 Ill. 498.

[5] Menkens v. Blumenthal, 27 Mo. 198.

Cunningham v. Roberson, 1 Swan (Tenn.), 138.

ally existing at the time, and the parties afterwards fairly erect such monument, intending to conform to the deed, the monument so placed will govern the extent of the land, although not entirely coinciding with the line described in the deed.[1] The acquiescence of proprietors of adjoining lands in a particular line is not unfrequently referred to, and received as evidence to determine their boundaries.[2] And a long acquiescence in an established boundary line was held not only to be evidence of an original parol agreement establishing the line, but ground for a direct legal inference, as to the true boundary line, of so controlling a nature that the party was precluded from offering any evidence to the contrary.[3] But parties are not bound by a consent to boundaries, which have been fixed under an evident error, unless, perhaps, by the prescription of thirty years;[4] though the Supreme Court of Missouri has held that in such a case the parties will be bound even though the time of prescription has not run, when one of them erects improvements and maintains possession for many years.[5]

§ 103. **Reputation Admissible, when.**—What is called reputation is never evidence of title, nor is it admissible in support of private rights;[6] yet it is sometimes admitted to establish the boundaries of particular parcels intended to be conveyed by deed; but the monuments which may be thus identified must, upon principle, be ancient and of a public or *quasi* public nature.[7]

[1] Lerned v. Morrill, 2 N. H. 197; Frost v. Spalding, 19 Pick. 445; Blaney v. Rice, 20 Pick. 62.

[2] Foulke v. Stockdale, 40 Iowa, 99; Fahey v. Marsh, 40 Mich. 236; Bolton v. Lann, 16 Tex. 96; Jackson v. Freer, 17 Johns. 29; Edwards v. White County, 85 Ill. 390; Davis v. Judge, 46 Vt. 655.

[3] Baldwin v. Brown, 16 N. Y. 359; McCoy v. Hance, 28 Pa. St. 149; Columbet v. Pacheco, 48 Cal. 359. But see Houx v. Batteen, 68 Mo. 84.

[4] Gray v. Couvillon, 12 La. Ann. 730.

[5] Majors v. Rice, 57 Mo. 384.

[6] Green v. Chelsea, 24 Pick. 71, 80.

[7] Nelson v. State, 1 Tex. App. 41; Shook v. Pate, 50 Ala. 91; Kellogg v. Smith, 7 Cush. 375; 1 Greenl. on Ev., § 145. See Whitney v. Smith, 10 N. H. 43; Gratz v. Beates, 45 Pa. St. 505; Nelson v. Hall, 1 McLean, 518;

§ 104. **Where a Grant of Land is Bounded by a Stream not Navigable, or by a Highway**, the boundary line extends to the center of such stream or highway, unless a contrary intention is clearly manifest from the conveyance itself.[1] This rule is founded upon the presumed intention of the grantor,[2] and applies only when the grantor is owner of the fee to the center,[3] and when the grant is in terms bounded on the stream or highway.[4] But it seems, where land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the general construction. The grantee takes the fee to the middle of the highway on the line of which the land is situated.[5] And this rule is applicable when the land conveyed is a lot or part of a lot in a town or city and designated on the plat by its number, or ascertained by its appropriate description, and abutting on a street, lane or alley.[6] A grant of land on a way was

Smith v. Prewitt, 2 A. K. Marsh. 158; Buchanan v. Moore, 10 Serg. & R. 281.

[1] Demeyer v. Legg, 18 Barb. (N. Y.) 14; Champlain Railroad v. Valentine, 19 Barb. (N. Y.) 488; Norris v. Hill, 1 Mann. (Mich.) 202; Nichols v. Suncook Mfg. Co., 34 N. H. 345; Pike v. Munroe, 36 Me. 209; Watson v. Peters, 26 Mich. 508; White v. Godfrey, 97 Mass. 472; Banks v. Ogden, 2 Wall. 57; Salter v. Jonas, 39 N. J. L. 469; Cox v. Louisville R. R. Co., 48 Ind. 178; Greer v. N. Y. Cent. R. R. Co., 37 Hun (N. Y.), 346; Pollock v. Morris, 51 N. Y. Super. Ct. 112; Transue v. Sell, 105 Pa. St. 604; Helmer v. Castle, 109 Ill. 664. But *contra*, where lot is bounded by "stones" or a "line" on the side of the road. Peabody Heights Co. v. Sadtler, 63 Md. 533; Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51. And see Gould v. Eastern R. R. Co., 142 Mass. 85; Holmes v. Turners Falls Co., *Id.* 590; Chadwick v. Davis, 143 Mass. 7. A deed conveyed a hotel "and the land adjoining it," held that a small island in rear of hotel, but separated therefrom by a small stream, did not pass. Miller v. Mann, 55 Vt. 475.

[2] Kingsland v. Chittenden, 6 Laus. (N. Y.) 15; Mott v. Mott, 68 N. Y. 246; Moody v. Palmer, 50 Cal. 31.

[3] Hoff v. Tobey, 66 Barb. 347.

[4] Kingsland v. Chittenden, 6 Laus. (N. Y.) 15; Babcock v. Utter, 1 Abb. Ct. App. (N. Y.) 27.

[5] Gear v. Barnum, 37 Conn. 229; Stark v. Coffin, 105 Mass. 328; Hawesville v. Lander, 8 Bush (Ky.), 679.

[6] Cox v. Louisville, etc. R. R. Co., 48 Ind. 178; Moody v. Palmer, 50 Cal. 31; Kneeland v. Van Valkenburg, 46 Wis. 434.

held to convey to the center of the way, notwithstanding a clause giving the use of the way in common with the grantor, his heirs or assigns.[1] But in another case a description, beginning at a point "on the bank of" a stream, thence by courses and distances back to "said stream," was construed to mean the bank and not the center of the stream.[2] So a deed was construed to exclude a road on the east, both termini of the boundary being on the westerly side of the road.[3] It may be remarked here that where a line is described as running from one monument to another, a direct line is implied, unless there is something to rebut the implication.[4] The circumstance that both points are on the same river has a tendency to destroy the implication.[5]

§ 105. **In Respect to Lands Bounded by Large Bodies of Water,** the rule seems to be that, where lands are conveyed bounded upon a natural pond or lake of fresh water, the boundary line will be the low-water mark.[6] In navigable streams or tide-waters, the land extends only to high-water mark.[7] In regard to what is a navigable stream, there is much seeming conflict of opinion. "By the common law, the title to land under water and the shores below ordinary high-water mark, in navigable rivers and arms of

[1] Motley v. Sargent, 119 Mass. 231. And see Hoff v. Tobey, 66 Barb. 347.

[2] Babcock v. Utter, 1 Abb. Ct. App. (N. Y.) 27.

[3] Cottle v. Young, 59 Me. 105. And see Severy v. C. P. R. R., 51 Cal. 194; Peck v. Denniston, 121 Mass. 17; O'Connell v. Bryant, 121 Mass. 557.

[4] Allen v. Kingsbury, 16 Pick. 235, 238; Henshaw v. Mullens, 121 Mass. 143.

[5] Slade v. Etheridge, 13 Ired. (N. C.) 353. But see People v. Henderson, 40 Cal. 32.

[6] Wheeler v. Spinola, 54 N. Y. 377. So provided by statute in some States as to navigable streams or lakes. Stimson's Am. Stat., § 1177. And see Waterman v. Johnson, 13 Pick. 261; Primm v. Walker, 38 Mo. 99.

[7] Middleton v. Pritchard, 3 Scam. 520; McManus v. Carmichael, 3 Iowa, 1; Haight v. The City of Keokuk, 4 Iowa, 199; Tomlin v. Dubuque, etc. R. R. Co., 32 Iowa, 106; Canal Commissioners v. The People, 5 Wend. 423, 424; Barney v. The City of Keokuk, Sup. Ct. U. S., 4 Cent. L. J. 491; Adams v. Pease, 2 Conn. 481. By statute in California as to seashore. Cal. Civ. Code, § 5830.

the sea, was vested in the sovereign for the public use and benefit; the true reason of which was that the passage-ways of commerce and navigation might be subject to public authority and control. But on account of the smallness of the rivers in England, tide-waters only were regarded as navigable; and hence, the rule as to property was often expressed as applicable to tide-waters only, although the reason of the rule would make it apply to all navigable waters." In this country, in many of the States, the form instead of the substance of the rule has been adopted, and the public title to the bed and shores of navigable streams is, in such States, confined to tide-waters;[1] while, in other States rivers, are deemed navigable waters when they are used or are susceptible of being used in their ordinary condition as highways for commerce between the States. The test by which, in this country, to determine the navigability of our rivers is found in their navigable capacity. Those rivers are navigable in law which are navigable in fact.[2] This question is regarded as settled so far as the general government is concerned. The United States or its grantees, by gift or purchase, cannot claim an interest in the soil below high-water mark. This soil belongs to the States.[3]

§ 106. **The Quantity of Land** mentioned in a deed as being the number of acres conveyed must yield to the

[1] Barney v. The City of Keokuk, 4 Cent. L. J. 491.

[2] McManus v. Carmichael, 3 Iowa, 1; Haight v. The City of Keokuk, 4 Iowa, 199; Tomlin v. Dubuque, etc. R. Co., 32 Iowa, 106. See the Daniel Ball, 10 Wall. 557; The Montemo, 11 Wall. 411.

[3] Railroad Co. v. Schurmeir, 7 Wall. 272. At the revolution the people of each State, in their sovereign character, acquired the absolute right to all navigable waters and the soil under them. Martin v. Waddell, 16 Pet. 367; Russell v. Jersey Co., 15 How. 426. And this right was not granted by the Constitution to the United States, but was reserved to the States respectively, and new States have the same rights, sovereignty and jurisdiction over this subject as the original ones. Pollard v. Hagan, 3 How. 212; Pollard v. Kibbe, 9 How. 471; Hallett v. Beebe, 13 How. 25; Withers v. Buckley, 20 How. 84. And see, in this connection, South Carolina v. Georgia, 93 U. S. 4.

boundaries contained in the description; and, if inconsistent with the actual area of the premises as thus ascertained, it will be rejected.[1] It aids in defining the premises intended to be granted, but is regarded as the least reliable and last to be resorted to in determining boundaries. In the absence of any express covenant as to quantity, this is always regarded as part of the description merely.

§ 107. **The Words "More or Less,"** when used in a deed in connection with a description of land, are used to designate approximately the quantity of land within the defined boundaries. They do not refer to the state of the title to such land or any part of it.[2]

§ 108. **Where a Deed Refers to Another Deed, or a Map or Survey,** it has the effect to incorporate such deed, map or survey into the description, the same as if copied into the deed itself, and what is therein described will pass.[3] Thus, a deed describing the land by courses and distances, with the addition of the words, "being the same premises conveyed to K., the grantor, by N., by deed dated," etc., was held to convey the whole premises in that deed, although the description omitted a small strip.[4] And where no other description is given of lands sold than by number of the lot in a survey of a tract of land, or the plat of a town or addition to the same, the authentic map of such survey or plat is as much a part of the deed as though set out in it.[5]

[1] Belden v. Seymour, 8 Conn. 19; Marshall v. Bompart, 18 Mo. 84; Ufford v. Wilkins, 33 Iowa, 110; Clark v. Scammon, 62 Me. 47; Field v. Columbet, 4 Sawyer, 523. And see Sanders v. Godding, 45 Iowa, 463; Ware v. Johnson, 66 Mo. 662; Hunter v. Morse, 49 Tex. 219.

[2] Howell v. Merrill, 30 Mich. 283; Williamson v. Hall, 62 Mo. 405; Clark v. Scammon, 62 Me. 47. And see Benton v. Horseley, 71 Ga. 619.

[3] City of Alton v. Ill. Trans. Co., 12 Ill. 38; Vance v. Fore, 24 Cal. 444; Boylston v. Carver, 11 Mass. 515, 517; Lippett v. Kelly, 46 Vt. 523; Allen v. Taft, 6 Gray, 552; Foss v. Crisp, 20 Pick. 121; Powers v. Jackson, 50 Cal. 429; Hudson v. Irwin, 50 Cal. 450. See Baxter v. Arnold, 114 Mass. 577; Walker v. Boynton, 120 Mass. 349; Sanborn v. Mueller (Minn.), 35 N. W. Rep. 666; Clamorgan v. Hornsby (Mo.), 6 S. W. Rep. 657; Cleveland v. Choate (Cal.), 18 Pac. Rep. 875.

[4] Wuesthoff v. Seymour, 22 N. J. Eq. 66. And see Auburn Church v. Walker, 124 Mass. 69; Lovejoy v. Lovett, *Id.* 270.

[5] Dolde v. Vodicka, 49 Mo. 100.

Thus, it was held that a designation by lot and block, followed by a description by metes and bounds embracing an area less than the lot, imports an intent of the grantor to convey the whole lot.[1] And when lands are conveyed by the subdivisions and numbers of government surveys, in the absence of intervening descriptions in deeds by metes and bounds, the boundaries of sections and divisions thereof, as marked and run in the original survey, are presumed to continue, and are conclusive as to such boundaries.[2] Though not located with mathematical precision, no error in placing the corners or marks can be corrected, altered or controlled, by other surveys.[3] In the absence of satisfactory proof of marked lines and corners, the plat and certificate of survey accompanying the grant will be evidence of the boundaries of the land granted.[4]

§ 109. **As Often as there is an Exception,** its effect is to take the lands out of the operation of the grant. The clause of exception may be in any part of the deed, but it is proper that it should follow the description of the thing granted, and it may with propriety be considered under that head. In the first place, the thing excepted should be as fully and accurately described as if it were being granted by an original grant. Therefore, the rules laid down for the identification of the subject of the grant will apply equally to exceptions.[5] An exception must be a part of the thing granted, and must be to be taken in substance out of that, so that he who excepts may have and own the thing

[1] Rutherford v. Tracy, 48 Mo. 327.

[2] Van Blarcom v. Kip, 2 Dutch. 351; Climer v. Wallace, 28 Mo. 556.

[3] Billingsley v. Bates, 30 Ala. 378.

[4] Tate v. Gray, 1 Swan (Tenn.), 73. The original descriptions of the subdivisions of the public lands, made by the Surveyor General from the field-notes or books of the deputy surveyor, and plats showing such subdivisions, are evidence as to their boundaries, and duly authenticated copies of such descriptions and plats are also evidence. Madison City v. Hildreth, 2 Carter (Ind.), 274.

[5] Where there is a description in a deed followed by an exception, which is uncertain, the exception may be void for uncertainty, but the description will stand. Thayer v. Torrey, 37 N. J. L. 339.

excepted.[1] It is to be observed that the exception must be of a particular thing out of a general or more comprehensive term, and not of a particular thing out of a certainty expressly granted. But its being a greater part is no objection; as if a grant be of a farm consisting of one hundred acres, and ninety-nine acres are excepted, the exception is good, since there is no repugnancy.[2] It is also to be observed, that there may be an exception out of an exception; as a farm, except a certain field, saving one rod square occupied by a spring, etc. Thus the spring so excepted out of the exception will remain within the operation of the grant. Any appropriate words—as except, besides, saving, or the like—which indicate the intention of the parties, will be sufficient to make an exception. So, an exception may be made in the form of a reservation, or a reservation in the form of an exception, and the court will, generally, construe it according as it is in nature an exception or reservation, in order to carry out the intention of the parties.[3]

ARTICLE VIII.

THE HABENDUM.

SECTION.

111. The *habendum* not an essential part of a deed.
112. Cannot introduce new parcels into the grant.
113. Party not named in the grant may take under the *habendum*, when.
114. As to the estate limited.
115. Rule in Shelley's case.
116. Freehold cannot be limited to commence *in futuro*.

§ 111. **The Habendum is a Formal and not an Essential Part of the Deed.**—In some of the States it has been

[1] 3 Prest. Abst., Tit. 37.
[2] *Ibid.*
[3] Whitaker v. Brown, 46 Pa. St. 197. See *infra*, Art. IX.

generally dispensed with, and in the remainder its usefulness is almost practically obsolete.[1] Its office is to repeat the name of the grantee, and to express the estate which is limited to pass;[2] and usually contains a description of, or reference to, the property granted. If the granting part of the deed contains proper words of limitation, nothing remains to be accomplished by the *habendum*. In construing a deed, if there is an apparent repugnance between the granting part and the *habendum*, in respect to the estate which the grantee is to take in the property granted, the different clauses will be reconciled, if possible, so as to give effect to both.[3] But if the language of the grant be definite in limiting the estate and the *habendum* is clearly repugnant, the latter will be rejected.[4]

§ 112. **The Habendum** can never introduce new subject-matter into the grant. Therefore, if more property is included in the *habendum* than is comprised in the grant, the additional parcels will not pass.[5] This rule, however, does not affect such incidents as are in effect included in the grant although they are only named in the *habendum*.[6] For instance, if the premises are granted with appurtenances, an easement which is appendant will pass, although the *habendum* be of the property together with the easement.

[1] Major's Admr. v. Buckley, 51 Mo. 227. But see Montgomery v Sturdivant, 41 Cal. 290.

[2] Mitchell v. Wilson, 3 Cranch. C. C. 242; Wager v. Wager, 1 Serg. & R. 374.

[3] Cummings v. Dearbon, 56 Vt. 441. Grant to woman *habendum* to the use of heirs, heirs will be construed as "her" heirs. Huntington v. Lyman, 138 Mass. 205. And see Brown v. Thrall, 28 Vt. 382; Allen v. Halton, 20 Pick. 458.

[4] Major's Admr. v. Buckley, 51 Mo. 227; Farquharson v. Eichelberger, 15 Md. 63; Budd v. Brooke, 3 Gill, 236; 2 Lom. Dig. 215; Flagg v. Eames, 40 Vt. 23; Ratliffe v. Marrs (Ky.), 7 S. R. Rep. 395.

[5] Manning v. Smith, 6 Conn. 292.

[6] The *habendum* refers to the premises and declares the estate which the grantee shall hold in them, and it may sometimes enlarge or diminish the grant when it is so worded as to show a clear intention to do so. Sumner v. Williams, 8 Mass. 162. But it cannot operate as a grant. *Ib.* Den. v. Helmes, 3. N. J. L. 1050.

The latter will pass by force of the grant as part of the deed.[1] The Supreme Court of Nevada, anticipating the drift of modern liberality in rules of construction, has gone, we think, rather beyond what the weight of present authority would warrant, and ruled that an explanatory clause or *habendum* of a deed may cause that to pass which could by no possible interpretation be held to have been described in the granting clause of the deed.[2] If express reference is made in the premises to the *habendum*, it may distribute or divide the property and regulate the mode in which it is to be enjoyed.[3]

§ 113. **A Person may Take under the Habendum** who is not named as a grantee in the granting part of the deed, provided there is no repugnance between these two clauses.[4] But when the grant is to one person, the *habendum* cannot be to him and another person, to take as joint-tenants or tenants in common; for, in such case, the *habendum* is at variance with the grant.[5] However, a person not being a grantee may be named to take by way of remainder;[6] and although the grant be to A. and B. and their heirs, the *habendum* may be to them and their heirs as tenants in common; or to hold one moiety or any other share, to one and his heirs, and to hold the other moiety or remaining share to the other and his heirs; or to hold one moiety to A. in fee, and the other moiety to A. or to B. for life or in tail, with or without remainder.[7]

§ 114. **As to the Estate which is Limited**, it may be re-

[1] 3 Prest. Abst. Tit. 40. And see Swazey v. Brooks, 34 Vt. 451.

[2] McCurdy v Alpha Mining Co., 3 Nev. 27.

[3] Tyler v. Moore, 42 Pa. St. 374.

[4] Tyler v. Moore, 42 Pa. St. 388; Irwing v. Longworth, 20 Ohio, 581. And see Warn v. Brown, 102 Pa. St. 347; Bean v. Kenmuir, 86 Mo. 666; Fletcher v. Horne, 75 Ga. 134.

[5] Greenwood v. Tyler, Hob. 314; 1 Wood on Conv., 199, 212; Shep. Touch. 76. Where, by the premises, the estate is granted to one, it cannot by the *habendum* be limited to another. Walters v. Breden, 70 Pa. St. 237.

[6] *Ibid.*

[7] 3 Prest. Abst. Tit. 42.

marked that the *habendum* cannot frustrate a grant complete before, or abridge or lessen the estate granted; as, if the grant be to A. and his heirs, and the *habendum* to A. for his life, the restrictive clause is void because it is inconsistent with the grant.[1] But where no estate is mentioned in the granting clause, then the *habendum* becomes efficient to declare the intention, and it will rebut any implication which would otherwise arise from the omission in this respect in the preceding clause.[2] Thus, if the grant be to A., the *habendum* may be to A. and his heirs, or heirs of his body, or for the life of B.[3] And one estate may be limited by the granting part of the deed, and another by the *habendum;* as a grant to A. and the heirs of his body, *habendum* to him and his heirs forever.[4] The rule is that, whenever the *habendum* can be construed so as to stand with the premises, it may explain or abridge the grant:[5] but if it is so repugnant or inconsistent as to be irreconcilable with the granting part, the *habendum* will be rejected.[6] We have before observed that, at common law, a grant without words of limitation will by implication be construed to mean an estate for life only; but by statute in many of the States a fee may now be limited without the use of the word "heirs."[7] In such States reference is to be had to the terms of the statute in determining how far the grant and the *habendum* are consistent with each other.[8]

§ 115. **Rule in Shelley's Case.**—There is, perhaps, no question that has occasioned more litigation than that which

[1] 3 Prest. Abst. Tit. 42; Shep. Touch. 102.

[2] Riggin v. Love. 72 Ill. 553.

[3] 3 Prest. Abst. Tit. 43.

[4] *Ibid.* And see Carson v. McCaslin, 60 Ind. 334; Jackson v. Ireland, 3 Wend. 99; Corbin v. Healy, 20 Pick. 514.

[5] Lee v. Tucker, 56 Ga. 9.

[6] Riggin v. Love. 72 Ill. 553; Carson v. McCaslin, 60 Ind. 337; 1 Wood on Conv., 199, 212; Shep. Touch. 74; *ante*, § 79.

[7] *Ante*, § 85; Stimson's Amer. Stats. § 1474; *Contra*, Batchelor v. Whitaker, 88 N. C. 350.

[8] See Nicholson v. Caress, 59 Ind. 39; Jordan v. McClure, 85 Pa. St. 495.

arises on the construction of an instrument in which a remainder is limited to the heirs, or the heirs of the body, of a person to whom a life estate in the same premises is given. The question being, on the determination of the life estate, whether the heirs of the body of such tenant for life shall be entitled to take as purchasers by virtue of the remainder so limited them, or whether the whole estate should vest in the first taker; or, as otherwise stated, whether such words are words of limitation, or words of purchase. This question was settled in England by what is termed the rule in Shelley's case; the substance of which is that, where the ancestor takes an estate of freehold, by any gift or conveyance, and in the same gift or conveyance there is a limitation either mediate or immediate to his heirs, or heirs of his body, the word heirs is a word of limitation of the estate, and not of purchase. The consequence of this rule is, that the first taker takes the whole estate, in fee-simple.[1] This rule has generally been assumed to be a part of the common law, and is in force in several of the States;[2] but in some it has been expressly abrogated by statute, and in others by judicial legislation.[3]

§ 116. **A Freehold Must not be Limited to Commence in Futuro.**—In considering the effect of the *habendum*, care is to be taken that the freehold is not limited to commence *in futuro*, and that the deed may operate as a covenant to stand seized, or as a bargain and sale, to uses. It is a general rule that the freehold cannot be placed in abeyance. And even when the instrument operates as a covenant to stand seized, or as a bargain and sale, the rule is not infringed. The freehold remains with the covenantor, or with the bargainor. The only difference is, feoffments, grants, and other assurances at the common law, do not admit of a

[1] Shelley's Case, 1 Rep. 94; 1 Prest. Estates, 264. And see Wilkerson v Clark (Ga.), with note, 28 Cent. L. J. 191.

[2] Ware v. Richardson, 3 Md. 505; Polk v. Faris, 9 Yerg. (Tenn.) 209; Roy v. Garnett, 2 Washb. (Va.) 9; Payne v. Sale, 2 Dev. & B. Eq. 455; Rivard v. Gisenhof, 35 Hun, 247.

[3] Turman v. White, 14 B. Mon. 560; Andrews v. Spurlin, 35 Ind. 262; Stimson's Amer. Stat., § 1406.

limitation to commence *in futuro*, except by way of term of years, or by way of remainder. In common-law grants, therefore, such future limitations of freehold interest will be void; while covenants to stand seized to uses, and bargains and sales, and trusts, admit of such future limitations.[1] It is to be observed, however, that in some of the States, a freehold *in futuro* may, by statute, be expressly granted.[2]

Although there has been much controversy as to whether any estate of freehold, other than by way of remainder, could be created *in futuro* by a deed of bargain and sale, it seems now to be settled, upon principle, that it may, the weight of authorities sustaining the doctrine laid down in our text.[3] But some of the cases hold that such a future limitation can only be sustained in a deed operating as a covenant to stand seized.[4] Terms of years may, on their creation, be limited to commence *in futuro;* and even terms of years already created may be assigned to hold from a day to come, or from an event, except that a limitation from and after the death of a person has been treated, in many cases, as repugnant.

ARTICLE IX.

THE REDDENDUM.

SECTION.

118. When used—distinguished from an exception.
119. The essentials to a good reddendum.

[1] 3 Prest. Abst. Tit. 47; Brewton v. Watson, 67 Ala. 121.

[2] *Ante*, § 56; Stimson's Amer. Stats., § 1421; Gorham v. Daniels, 23 Vt. 600.

[3] Rogers v. Eagle Fire Co., 9 Wend. 611, 631; Bell v. Scammon, 15 N. H. 381. See 2 Washb. on Real Prop. 618; Burt. on Real Prop., § 145; 2 Bl. Com. 166; 2 Prest. on Conv., 157; Jackson v. Swart, 20 Johns. 87, 93; Trafton v. Hawes, 102 Mass. 533.

[4] Jackson v. Delancey, 4 Cow. 427; Brewer v. Hardy, 22 Pick. 376, 380; Wallis v. Wallis, 4 Mass. 135; Welsh v. Foster, 12 Mass. 73, 76; Marden v. Chase, 32 Me. 329. And see Barrett v. French, 1 Conn. 354.

§ 118. **When Used.—Distinguished From an Exception.**—The reddendum is used when something is to be reserved out of the property granted. The distinction between a reservation and an exception is, that by an exception the grantor withdraws from the effect of the grant some part of the thing itself which exists in substance at the time of making the grant, and which is included in the granted premises; while a reservation is of some new right or other thing issuing or coming out of that which is granted, and not a part of the thing itself;[1] or it may be of an existing easement or servitude, not capable of being severed from the grant.[2] And whether a restriction in a deed will be deemed a reservation or an exception, depends less upon the words used, than upon the nature of the right or thing reserved or excepted.[3] Thus, where "excepting" is used

[1] Shep. Touch. 80; Craig v. Wells, 11 N. Y. 315; Marshall v. Trumbull, 28 Conn. 183; State v. Wilson, 42 Me. 9; Ives v. Van Auken, 34 Barb. 566; Ashcroft v. Eastern R. R., 126 Mass. 196; Whitaker v. Brown, 46 Pa. St. 197; Bridger v. Pierson, 1 Lans. 481; Stackbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Munn v. Worrall, 53 N. Y. 44; Moulton v. Trafton, 64 Me. 218.

[2] Cutler v. Tufts, 3 Pick. 272, 278; Doe v. Lock, 4 Nev. & M. 807; Pettee v. Hawes, 13 Pick. 323, 326; Hurd v. Curtis, 7 Mete. 110. In Choate v. Burnham, 7 Pick. 274, the reservation was of a privilege of a way through the granted premises. So, in Ashcroft v. Eastern R. R., 126 Mass. 196, a clause in a deed to a railroad corporation "reserving to myself the right of passing, and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," *held* a reservation and not an exception. But another case, where one granted a farm, reserving the highways across it, this was construed to be an exception as to the easements, in the covenants contained in his deed, and not of the soil of these. Richardson v. Palmer, 38 N. H. 212. See Bridger v. Pierson, 45 N. Y. 601, 603; Winthrop v. Fairbanks, 41 Me. 311; Leavitt v. Towle, 8 N. H. 96.

[3] A grant of land reserving the use of a well is a reservation and not an exception, and the grantee has a right to use it also if he could do so without interfering with the use of it by the grantor. Barnes v. Burt, 38 Conn. 541. A limited right to cut and carry away timber from the granted premises treated as a reservation. Hornbeck v. Westbrook, 9 Johns. 73; Rich v. Zeilsdorff, 22 Wis. 544. When the expressed intention of the parties is the controlling consideration, the distinction between exceptions and reservations is not material.

with evident intention to create a reservation, effect will be given to it in that sense. And that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.[1] A reservation in a deed is sometimes construed also as an implied covenant, For example, it has been held that a deed in consideration of natural love and affection, conveying land but reserving to the grantor the use thereof during his life, operates as a covenant to stand seized to the use of the donee.[2] The construction of a reservation, as of other parts of a deed, is to be most strongly against the grantor, yet the obvious intention of the parties, as shown by the words used, must govern.[3]

§ 119. **The Essentials to a Good Reddendum.**—In every good reddendum or reservation these things must concur, namely: The reservation must be made to a grantor and not to a stranger to the deed;[4] it must be out of the estate granted and not out of something else;[5] the thing or property reserved must, as in the case of an exception, be described in sufficiently definite terms to afford some means of identification,[6] and being equal to a grant must contain

[1] Winthorp v. Fairbanks, 41 Me. 307. A deed "reserving all the minerals underlying the soil," being a part of the land described in the deed, the intention of the grantor evidently being to retain a fee-simple title to the minerals, was held to create an exception. Sloan v. Lawrence Furnace Co., 29 Ohio St. 568.

[2] McDaniel v. Johns, 45 Miss. 632.

[3] Wiley v. Sirdorus, 41 Iowa, 224. The rule that a deed or grant must be construed most strongly against the grantor applies with especial force to a reservation in a deed whereby there is a withholding of something from the grant. Klaer v. Ridgway, 86 Pa. St. 529.

[4] Hornbeck v. Westbrook, 9 Johns. 74; Petition of Young, 11 R. I. 636; Bridger v. Pierson, 1 Lans. 481; Illinois R. R. Co. v. Indiana R. R. Co., 85 Ill. 211. But it may operate, when so intended by the parties, as an exception from the thing granted and as notice to the grantee of adverse claims as to the thing excepted and reserved. West Point Iron Co. v. Reymert, 45 N. Y. 703. And see Bridger v. Pierson, 45 N. Y. 601; Brossart v. Corlett, 27 Iowa, 288.

[5] Dyer v. Sanford, 9 Mete. 395.

[6] Woodcock v. Estey, 43 Vt. 515; Jewett v. Ricker, 68 Me. 377. The same certainty of description is required in a reservation or exception

words of limitation, in order to extend beyond the life of the grantor.[1] In England, the term reservation applies chiefly to rents, or something in the nature of rents;[2] but, as we have seen, in this country it has a more extended signification.

ARTICLE X.

CONDITIONS, LIMITATIONS AND OTHER SPECIAL AGREEMENTS.

SECTION.

121. Such stipulations may appear in any part of the deed.
122. A condition defined.
123. General and special conditions.
124. Conditions precedent and subsequent.
125. Void conditions.
126. Whether a condition or a covenant.
127. Conditions distinguished from limitations.
128. Distinguished from remainders.

§ 121. **Such Conditions may Appear in any Part of the Deed.**—Stipulations in the form of conditions, limitations and similar agreements, as often as they are contained in a deed, are properly inserted next after the *habendum* or *reddendum*, but may appear in any other part of the instrument and be equally effectual.

§ 122. **A Condition** is a qualification or restriction, an-

out of a grant as in the grant itself; and when a deed reserves out of the conveyance one acre of land and there is nothing in the exception or evidence to locate it upon any particular part of the tract, the reservation is void for uncertainty and the grantee takes the entire tract. Mooney v. Cooledge, 30 Ark. 640.

[1] Ashcroft v. Eastern R. R., 126 Mass. 198; Dennis v. Wilson, 107 Mass. 591; Handy v. Foley, 121 Mass. 158; Bean v. Coleman, 44 N. H. 542; Hornbeck v. Westbrook, 9 Johns. 73. But no words of limitation are necessary in case of an exception. Winthrop v. Fairbanks, 41 Me. 307.

[2] 1 Wood on Conv. 225.

nexed to a conveyance of lands, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, restricted, or defeated. The stipulations in the form of conditions are various, and may be of any kind not inconsistent with the general rules of law or against public policy.[1]

§ 123. **Conditions are either General or Special.**—The former put an end altogether to the tenancy on entry for breach; but the latter only authorize the reversioner to enter on the land and take the profits to his own use and hold the land by way of pledge until the condition be fulfilled.[2]

§ 124. **Conditions are also either Precedent or Subsequent.**—A precedent condition is one which must take place before the estate can vest or be enlarged. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated.[3] There are no technical words to distinguish them; whether a condition is precedent or subsequent, depends on the intention of the parties.[4] Precedent conditions must be literally performed. Courts of equity will

[1] A condition in a deed that no intoxicating liquors shall be manufactured or sold to be used as a beverage, by the grantee, his heirs or assigns, upon the premises conveyed, and imposing forfeiture and giving a right of re-entry upon condition broken is a valid condition, not repugnant to the grant; and upon proof of breach the grantor may recover in ejectment without previous entry, demand or notice. Plumb v. Tubbs, 41 N. Y. 442; O'Brien v. Wetherell, 14 Kan. 616; Collins v. Marcy, 25 Conn. 242; Cowell v. Col. Springs Co., Sup. Ct. U. S., 9 Cent. L. J. 461; Smith v. Barrie, 56 Mich. 314. As to conditions defined by statute. See Stimson's Amer. Stat., § 1360.

[2] Co. Litt. 203*a*; Shep. Touch. 157; 4 Kent's Com. 124.

[3] A deed providing that if spirituous liquors be sold on the premises it should be void, is held a condition subsequent. Jeffery v. Graham, 61 Tex. 481. So also a conveyance to a railroad in consideration of its maintainance of depot on land adjoining. C., C. & I. Ry. Co. v. Coburn, 91 Ind. 567. So also land conveyed to county for court house. Pepin County v. Prindle, 61 Wis. 301. But see Henry v. Etowah County, 77 Ala. 538.

[4] 4 Kent's Com. 124, 125; Sheppard v. Thomas, 26 Ark. 617; Shinn v. Roberts, 20 N. J. L. 435; Underhill v. S. & W. R. R., 20 Barb. 455.

not, in general, relieve from the consequences of a condition precedent unperformed.[1] A deed upon condition subsequent conveys the fee with all its qualities of transmission. The condition has no effect to limit the title until it becomes operative to defeat it.[2] Notwithstanding a breach of the condition, the estate continues in the grantee, until defeated by actual entry made for the purpose of claiming a forfeiture by some one having a right to do so.[3] Such entry may be made by the grantor or his heirs.[4] But after condition broken the grantor's right of entry cannot be conveyed to a stranger.[5]

If a condition subsequent be possible at the time of making it and afterwards becomes impossible to be complied with, either by the act of God or of law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee being once vested, is not thereby divested, but becomes absolute.[6]

§ 125. **Void Conditions.**—Among the conditions which upon principles of public policy are void as against law, are those in restraint of alienation or marriage; though if these be limited to a particular time or person they may be valid.[7]

[1] Scott v. Tyler, 2 Bro. C. C. 431; Bertie v. Falkland, Freem. Ch. 220.

[2] Shattuck v. Hastings, 99 Mass. 23; Memphis R. R. Co. v. Neighbors, 51 Miss. 412.

[3] Cross v. Carson, 8 Blackf. 138; Kenner v. Amer. Con. Co., 9 Bush, 202; Osgood v. Abbott, 58 Me. 73. See 2 Washb. on Real Prop., 451, 452; Guild v. Richards, 16 Gray, 309; Memphis R. R. Co. v. Neighbors, 51 Miss. 412; Chapman v. Pingree, 67 Me. 198.

[4] Osgood v. Abbott, 58 Me. 77. There need not be an express reservation of a right to enter for the breach of a condition. Thomas v. Record, 47 Me. 500.

[5] Co. Litt. 214, a.; 214, b.; Shep. Touch. 231; 2 Washb. on Real Prop. 599; Guild v. Richards, 16 Gray, 309; Dewey v. Williams, 40 N. H. 222.

[6] Taylor v. Sutton, 15 Ga. 103; Hughes v. Edwards, 9 Wheat. 489; United States v. Arredondo, 6 Pet. 691; Merrill v. Emory, 10 Pick. 507; Barksdale v. Elam, 30 Miss. 694.

[7] Attwater v. Attwater, 18 Beav. 330; Doe v. Pearson, 6 East, 174; Co. Litt. 223, a. If the condition be in absolute restraint of marriage until the devisee is twenty-one years of age, it is a reasonable and, therefore, a good condition, though subsequent, and will defeat the estate if violated. Shackelford v. Hall, 19 Ill. 212.

Conditions are not sustained when repugnant to the nature of the estate granted, or when they infringe upon the essential enjoyment of the rights of property, and tend manifestly to public inconvenience.[1] But if the condition is precedent, inasmuch as the estate does not vest at all until such condition happens, the effect of its being unlawful or impossible is that the estate dependent on it fails, and the grant becomes wholly void.[2]

§ 126. **Whether a Condition or a Covenant.**—Conditions, especially conditions subsequent, are not favored in law, because they tend to destroy estates.[3] When relied on to work a forfeiture they must be created by express terms or clear implication, and are construed strictly. Courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so,[4] and the question as to whether a clause implies a condition or a covenant often depends upon the apparent intention of the parties rather than upon fixed rules of construction.[5] The distinc-

[1] Gadberry v. Sheppard, 27 Miss. 203; Kellam v. Kellam, 2 P. & H. (Va.) 357. Deed conveying absolute title in fee, and by way of condition providing that the land if not disposed of during grantee's lifetime shall revert to the grantor, the condition being repugnant to the grant, is void. Case v. Devise, 60 Iowa, 442.

[2] Co. Litt. 206; Taylor v. Mason, 9 Wheat. 325; Martin v. Ballou, 13 Barb. 119.

[3] Laberee v. Carleton, 53 Me. 211; Southard v. Central R. R., 26 N. J. L. 13; Hoyt v. Kimball, 49 N. H. 322; Page v. Palmer, 48 N. H. 385; Wilson v. Galt, 18 Ill. 431; Thompson v. Thompson, 9 Ind. 323. Stipulation that property should be used for burying ground or church, held not a condition. Rawson v. Uxbridge School District, 7 Allen, 125; Episcopal City Mission v. Appleton, 117 Mass. 326. But see Bennett v. Culver, 97 N. Y. 250; Adams v. Valentine, 33 Fed. Rep. 1. Stipulation in a clause that a dwelling house should be erected on the land to cost not less than certain sum, held not a condition. Stone v. Houghton, 139 Mass. 170.

[4] 4 Kent's Com. 132; Hoyt v. Kimball, 49 N. H. 322; Packard v. Ames, 16 Gray, 327; Thornton v. Trammell, 39 Ga. 202; Ayer v. Emery, 14 Allen, 67. Still they are not to ignore the settled legal significance of the language employed. Adams v. Valentine, 33 Fed. Rep. 1.

[5] 2 Par. on Cont. 31; Platt on Conv. 71. See Woodruff v. W. P. Co., 10 N. J. Eq. 489; McCullough v. Cox, 6 Barb. (N. Y.) 386; Houston v. Spruance, 4 Harr. (Del.) 117.

tion between conditions and covenants may be illustrated thus—while a covenant may be said to be a contract, a condition is something affixed as a penalty for non-fulfillment of a contract; a covenant may be made by the grantee; a condition, by the grantor only.[1]

§ 127. **Conditions are to be Distinguished from Limitations.**—A stranger may take advantage of a limitation, but only the grantor or his heirs, of a condition.[2] A limitation always determines an estate without entry or claim, a condition does not.[3] If a condition subsequent be followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation, and partakes both of the nature of a condition and a limitation. Words of limitation mark the period which is to determine the estate, and, upon the contingency taking place, the estate passes to the reversioner without entry; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the period described by the limitation.[4]

§ 128. **Conditions are also to be Distinguished from Remainders.**—A condition operates to defeat an estate before its natural termination: a remainder takes effect on completion of a preceding estate.[5] There is a nice distinction made between conditional limitations and contingent remainders. Thus, it is said, "contingent remainders are limited to commence when the first estate is, by its orignal limitation, to determine; but conditional limitations are so

[1] 2 Coke, 70. A condition in a deed, when explicit words creating a condition are used, will not be construed a covenant except to avoid a forfeiture. Underhill v. Saratoga R. R., 20 Barb. 455; Sharon Iron Co. v. Erie, 41 Pa. St. 341.

[2] Southard v. Central R. R., 26 N. J. L. 1; People of Vermont v. Society, 2 Paine C. C. 545.

[3] *Id.*; Osgood v. Abbott, 58 Me. 73; Guild v. Richards, 16 Gray, 309.

[4] 4 Kent's Com. 127; Brattle Square Church v. Grant, 3 Gray, 142; Stearns v. Godfrey, 16 Me. 158; Fifty Associates v. Howland, 11 Metc. 99.

[5] Co. Litt. Butler's Notes, 91, 99; Stearns v. Godfrey, 16 Me. 158.

limited as to be independent of the extent and measure given to the first estate, and are to take effect upon an event which may happen before the regular determination of the first estate, and so rescind it."[1] "The distinctions on this subject," says Chancellor KENT, "are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case."[2] The learning under the head of remainders belongs to the doctrine of estates, rather than conveyancing, and will be found in general treatises upon the law of real property.

ARTICLE XI.

USES, TRUSTS AND POWERS.

SECTION.

131. The subjects to be discussed under the present heading.
132. Uses defined.
133. Shifting or secondary uses.
134. Springing uses.
135. Future and contingent uses.
136. Uses in the United States.
137. Origin of trusts.
138. Our present system of trusts.
139. Classification of trusts.
140. Simple and special trusts.
141. Executed and executory trusts.
142. Active and passive trusts.
143. Ministerial and discretionary trusts.
144. Trusts divided in reference to their creation.
145. The parties to a trust.
146. The creation and assignment of trusts.
147. Powers are of two sorts.

[1] Fearne on Remainders, 10, 18; Cogan v. Cogan, Cro. Eliz. 360; Episcopal City Mission v. Appleton, 117 Mass. 326.

[2] 4 Kent's Com. 132.

148. Power of appointment defined.
149. General and particular powers.
150. Powers collateral, appendant and in gross.
151. The creation of a power.
152. The execution of powers.
153. Who may execute a power.
154. Conditions annexed to power must be strictly complied with.
155. Power need not be referred to in its execution.
156. The appointee takes under the original deed.
157. Equity jurisdiction over the execution of powers.
158. The suspension and destruction of powers.

§ 131. **The Subjects** embraced under the present head comprise, it has been said, the most intricate labyrinth of our jurisprudence, the magnitude of which is too great to admit of our presenting more than a brief outline here. But the Statute of Uses and the doctrines of law and principles of equity founded upon it, are of too much importance to our system of conveyancing, not to receive some notice in a work like the present.

§ 132. **Uses** existed in the Roman law under the name of *fidei commissa*, or trusts, from whence they were borrowed by the ecclesiastics and introduced into England for the purpose of evading the Statute of Mortmain, which, it will be remembered, prohibited religious corporations from holding land. A use, as it existed before the Statute of Uses, was a right to receive the profits of land of which the legal ownership was vested in some other person. The common law courts refused to recognize uses, and consequently left a *cestui que use* entirely dependent upon the good faith of his trustee. But the clerical chancellors of those times held such trusts or confidences to be binding upon the conscience, and accordingly enforced them. To avoid many incoveniences growing out of the doctrine of uses, the Statute of Uses was passed,[1] which enacts that, "when any person shall be seized of lands, etc., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life or years, or otherwise, shall from thenceforth stand and be seized or

[1] 27 Henry VIII., ch. 10.

possessed of the land, etc., of and in the like estate as they have in use, trust or confidence; and that the estates of the persons so seized to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use." The statute thus executes the use; that is, it conveys the possession to the use, and transfers the use to the possession, and in this manner makes the *cestui que use* complete owner of the lands, as well at law as in equity.[1] Thus, a modern use has been defined to be "an estate or right acquired through the operation of the Statute of Uses, and which, when it may take effect according to the rules of the common law, is called the legal estate, and when it may not, is denominated a use, with a term descriptive of its modification."[2] But in the construction of the statute, it was held that a use could not be raised upon a use, and, therefore, on a feoffment to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, the statute executed only the first use, and the second was a mere nullity, which again opened the doors of the court of chancery. This court declared the second use to be valid in equity, and compelled B. to act as trustee for C., who was then called the *cestui que trust*, to distinguish him from the *cestui que use;* so that the only difference made in equitable estates, which the statute was designed to abolish, was apparently to substitute trust for uses. But the effect of the statute upon legal estates was far more important. When a use was changed from an equitable to a legal estate the same qualities which were proper to it in its fiduciary state followed it when it became a legal estate. The equitable doctrine of uses was thus transferred to the courts of law, and became additional branches of the law of real property. "The practical result was the addition of the words 'to the use of,' to every conveyance."[3] The pliable qualities

[1] 2 Bl. Com. 333.

[2] Cornish Uses, 35.

[3] Williams on Real Prop. 133.

belonging to uses were well adapted to answer various purposes to which estates at common law could not be made subservient, by means of shifting, contingent and springing uses, and by the reservation of a power to revoke the uses of the estate and direct others. These presented a method of creating a future interest in land, and facilitated the development of the system of conveyances which derive their effect from the Statute of Uses.

§ 133. **Shifting or Secondary Uses** are such as take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in the deed.[1] For example, if an estate be limited to A. and his heirs until B. pays A. $100, and then to the use of B. and his heirs, the estate is vested in A. subject to a shifting or secondary use in B. A common application of these shifting uses is found in marriage settlements; the first use being to the owner in fee till after marriage, and then to other uses. The doctrine of shifting or secondary uses furnished a means of evading the principle of the common law, that a fee could not be limited after a fee.[2]

§ 134. **Springing Uses** are limited to arise in a future event, where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime.[3] A grant to A. in fee, to the use of B. in fee, after the first day of March next, is an instance of a springing use, and no use arises until the limited period. The use in the meantime results to the grantor, who has a determinable fee.[4] By means of powers, a use, with its accompanying estate, may be made to *spring up* at the will of any given person. Springing uses may be raised by any form

[1] Gilb. Uses, Sugd. ed. 152, n.; 4 Kent's Com. 297; 2 Washb. on Real Prop., 4th ed., 618.

[2] For the learning under this head, see 2 Washb. on Real Prop. 4th ed., 284. *et seq.*; Williams on Real Prop. 243; Plowd. 25.

[3] Gilb. Uses, Sugd. ed. 153, n.

[4] Woodliff v. Drury, Cro. Eliz. 439.

of conveyance; but in the common-law conveyances, which operate by transmutation of possession, the estate must be conveyed, and the use be raised, out of the seizin created in the grantee by the conveyance; while, in covenants to stand seized and conveyances by bargain and sale, the use is severed out of the grantor's seizin and executed by the statute.[1]

§ 135. **Future or Contingent Uses** are limited to take effect as remainders, and are subject to the same rules as contingent remainders. If lands be granted to A. in fee, to the use of B., on the occurrence of a specified event, it is a future contingent use, because it is uncertain whether the event will ever occur.[2]

§ 136. **Uses in the United States.**—The extent to which the doctrine of uses and the conveyances founded thereon have been introduced into the jurisprudence of this country, cannot be defined with any satisfactory degree of accuracy. In some of the States the Statute of Uses has been recognized as a part of the common law.[3] And in others similar statutes have been enacted.[4] But in several of the States it has never been recognized; while in others it has been expressly determined not to form a part of the common law.[5] And in New York uses have been abolished by

[1] 4 Kent's Com. 298.

[2] Illustrations of the various shades of distinction and modifications of future uses are given by Mr. Preston, in his work on Abstracts of Title, Vol. 1, 105-107.

[3] Horton v. Sledge, 29 Ala. 478; Rollins v. Riley, 44 N. H. 11; Bryan v. Bradley, 16 Conn. 483; Marshall v. Fisk, 6 Mass. 31; Richardson v. Stodder, 100 Mass. 528; Nightingale v. Hidden, 7 R. I. 115; Adams v. Guerard, 29 Ga. 651; Hutchins v. Heywood, 50 N. H. 491.

[4] Ill. Stats. 1883, ch. 30, § 3; Mo. Rev. Stats. 1879, § 3938; S. C. Gen. Stats. 1882, §§ 1958-1960. In Virginia, the statute only executes the seizin to the use in the case of deeds of bargain and sale, of lease and release, and covenants to stand seized to use. It does not, like the English statute, include every case where any person may stand or be seized to the use of any other person. Lomax's Digest, Laws of Real Prop. Vol 1, 188. See in Wisconsin, Riehl v. Bingenheimer, 28 Wis. 84; Rev. Stats. 1878, ch. 96, p. 618. In Michigan, Ready v. Kearsley, 14 Mich. 228.

[5] Thompson v. Gibson, 2 Ohio, 439; Helfenstine v. Garrard, 7 *Id.* 270. And see Sherman v. Dodge, 28 Vt. 26; Gorham v. Daniels, 23 Vt. 600.

statute.[1] In consequence of this want of uniformity in the statutes and rulings of the courts of the several States, as well as of the great variety of forms and systems of conveyances, it would be impracticable to attempt to define the extent to which uses are in force in the several States. The intelligent practitioner will determine that for himself by reference to the statutes, decisions and precedents for conveyances in his own State.

§ 137. **The Origin of Trusts.**—We have seen in what manner the object of the Statute of Uses was subverted, by the courts of law and equity, by the substitution of trusts in the place of uses.[2] It was held that a use could not be raised upon a use; therefore, at law, a second limitation to uses was simply void. And thus it was that the statute executed only the first use, leaving the beneficiary of the second use, or the *cestui que trust*, as he was called, to seek his remedy in a court of equity. Chattel interests were also held not to be within the statute, because it referred only to persons who were *seized*. The tenant of a term was held not to be technically seized, and so the statute did not apply to a term of years.[3] And again, the statute did not execute the legal title to the *cestui que use* if the first taker was to perform any active duties in regard to the estate; as, if he was to hold the same for a certain time, or was to improve or lease the same and pay over the rents.[4] In each of these cases the parties beneficially interested in the property had no remedy at law for any withholding of their rights. The courts of chancery laid hold of this want of redress at law, and compelled the performance of these *uses* under the name of *trusts*, and thus was afforded the opportunity of establishing, by gradual devel-

[1] Rev. Stats., Vol. 2, p. 1105, §§ 45, 46.

[2] *Ante*, § 132.

[3] Doe v. Passingham, 6 Barn. & Cress. 305; Tyrell's Case, Dyer, 155; Meredith v. Jones, Cro. Car. 244; Anon, Dyer, 369 a.

[4] Kellogg v. Hale, 108 Ill. 164. Where the grant was to A. and his heirs to receive the rents and pay them over to B. and his heirs, it was held to be a trust which descended to the heirs of B., and that B. could not convey the land. Harlow v. Cowdrey, 109 Mass. 183.

opment, a code of very refined jurisprudence, well suited to the varying wants and necessities of an advancing civilization.

§ 138. **Our Present System of Trusts.**—Trusts are at present what uses were before the statute, so far as they are mere fiduciary interests, distinct from the legal estate. They are defined to be "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence."[1] The right of the beneficiary, the obligation of the trustee and the subject-matter, together constitute the trust. The Statute of Uses was passed before the colonists left England, and it became, as we have seen, a part of the common law in some of the colonies.[2] But the doctrine of trusts founded upon that statute had not been reduced to a system when America was first settled, and was not introduced into the jurisprudence of this country until many years after. And Mr. Story considers it a favorable circumstance that equity jurisdiction was not conferred upon our courts until the system had been settled upon a broad and rational foundation.[3] Trusts are now recognized in the legislation of all the States, and provisions and rules are made for their creation, regulation and duration, and in some States for their administration; but they are still left to the exclusive cognizance and jurisdiction of courts of equity, or to the equity powers of the common law courts. It is not our purpose to review the legislation of each State upon this subject, but simply to state a few of the general principles applicable in all of the States.

§ 139. **Classification of Trusts.**—Trusts are either simple or special; executed or executory; active or passive; ministerial or discretionary.

§ 140. **Simple and Special Trusts.**—A simple trust is one where property is conveyed to one person in trust for

[1] Stair's Inst. Laws, Scotland, B. IV. Tit. 6, §§ 2, 3, pp. 591, 592; Willis' Trusts, 1; 1 Sand. Uses and Trusts, 6; 3 Bl. Com. 431.

[2] Perry on Trusts, § 9; *Ante*, § 136.

[3] Story's Eq. Jur., § 56.

another, without any further specifications or directions. In such case the law regulates the trust. The legal title is merely vested in the grantee; the *cestui que trust* is entitled to the rents and profits, has power to dispose of the land, and may call upon the trustee to execute the requisite conveyances.[1]

Special trusts are trusts created for a specified purpose; as for the accumulation of profits, the sale of estates, and other dispositions of trust funds. Trusts of this character preclude all power of interference on the part of the *cestui que trust* until the purposes of the trust are satisfied.[2]

§ 141. **Executed and Executory Trusts.**—An *executed* trust is one where the legal or equitable estate passes to the trustee at its creation.[3] It may be suggested, that it frequently becomes an important and difficult question to determine whether the estate limited is legal or equitable. We will not stop here to discuss that question, but refer the reader to Mr. Washburn's treatise on the Law of Real Property, for a very clear illustration of the subject.[4]

An *executory* trust is one which is to be perfected at a future period by a conveyance or settlement; as, in case of a conveyance to B. in trust to convey to C.[5]

§ 142. **The Distinction Between Active and Passive Trusts** corresponds very nearly to that between executed and executory trusts. An *active* trust is one in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated. While a *passive*, or dry trust, as it is sometimes called, is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the legal title merely rests in the trustee.[6]

[1] Williams on Real Prop. 135; Perry on Trusts, § 18; 2 Washb. on Real Prop. 4th ed., 166.

[2] Sander's Uses, 186.

[3] 1 Preston Est. 190.

[4] 2 Washb. on Real Prop. 4th ed., 167, 168, *et. seq.*

[5] Bouv. L. Dic. Trusts.

[6] Bouv. L. Dic. Trusts; Goodrich v. Milwaukee, 24 Wis. 422.

§ 143. **Ministerial and Discretionary Trusts.**—A *ministerial* trust is one where the trustee is to do a simple ministerial act, an act requiring the exercise of no judgment or discretion. Thus, a trust to convey to the *cestui que trust*, at his request, is ministerial. But where a choice of time, manner or place is given to the trustee, or if he must use his best judgment in the execution of the trust, it is a discretionary trust.[1] This distinction is not very important, or of much service in determining the duties of a trustee in any given case.

§ 144. **Trusts are Divided, in Reference to their Creation,** into express and implied trusts. *Express* trusts are those which are created in express terms in the deed, writing or will. *Implied* trusts are trusts raised by implication or construction of law, from the words used; or, are presumed to exist from the supposed intention of the parties or the nature of the transaction. The latter definition embraces resulting trusts and constructive trusts. An instance of *resulting* trust occurs where one man pays the purchase-money for an estate and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money. A *constructive* trust arises where a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be in trust for the benefit of the *cestui que trust*.

§ 145. **The Parties to a Trust.**—In the first place it may be stated, as a general rule, that all persons have the same power to create trusts as they have to make a disposition of their property, and whoever is capable of taking the legal title or beneficial interest in property may take the same in trust for another.[2] It may be stated further, as a rule that admits of no exception, that when a trust is once properly created, equity will not allow it to fail on account of the

[1] Attorney-General v. Gleg, 1 Atk. 356; Perry on Trusts, § 19.

[2] Malin v. Malin, 1 Wend. 625; Kerr v. Day, 14 Pa. Sts. 114; Pollexfen v. Moore, 3 Atk. 293; McKay v. Carrington, 1 McLean, 50.

incompetency, disability, death or non-appointment of a trustee.[1] If the trust or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether it be the grantor, testator or heir, as the case may be. But to sustain a trust —outside of the domain of *charitable* uses—there must always be a beneficiary, ascertained or capable of being ascertained, who has a right to enforce it.[2]

§ 146. **The Creation and Assignment of Trusts.**—We have already seen that every legal estate of freehold must be created and transferred by deed. But this is not so with equitable estates.[3] Although it is usual to adopt the same forms of conveyance by deed in the creation and assignment of trusts as in the transfer of legal estate, such formality is not necessary.[4] And no particular form of words is requisite to create a trust, provided the intention is clearly indicated.[5] It may be remarked that a declaration of trust is not a grant, and may be as well and effectually declared in the reciting part of a conveyance as in any

[1] Perry on Trusts, § 38; Co. Litt. 290, b., 113 a., Butler's n. 1; Story's Eq. Jur., §§ 98, 976.

[2] Williams v. Williams, 8 N. Y. 540; Story's Eq. Jur. §§ 964, 976; Sander's Uses, 58, 389, n.

[3] Except such trusts as may arise by implication or operation of law, no trust concerning lands can, in nearly all the States, be created or declared except by will or deed executed like other deeds by the party making or creating the trust or his attorney. Stimson's Am. Stats., § 1110. Recording trust also necessary in same States. *Ibid.* § 1717.

[4] Co. Litt. 290, b., n. 249, § 14; Williams on Real Prop. 140. It is held in Pennsylvania that a declaration of trust by a married woman must be executed with the formalities required by statute in a conveyance of her real estate. Graham v. Long, 65 Pa. St. 383.

[5] Norman v. Burnett, 25 Miss. 183; Scituate v. Hanover, 16 Pick. 222; White v. Fitzgerald, 19 Wis. 480, 485; Brown v. Combs, 29 N. J. L. 36; Chamberlain v. Thompson, 10 Conn. 243; Cook v. Barr, 44 N. Y. 156; Ivory v. Burnes, 56 Pa. St. 300. So provided by statute in Ga. Code 1882, § 2305. And the terms "wish" and "desire" may be sufficient. Cockrill v. Armstrong, 31 Ark. 580. See Perry on Trusts, § 112, *et seq.*, for numerous illustrations.

other.[1] All that is required is a writing signed by the party creating the trust. Prior to the Statute of Frauds a parol declaration was equally valid with one however solemnly made; and this is still the law in one or two of the States, where that statute has not been adopted.[2] The seventh section of that statute enacts that all declarations or creations of trusts or confidences in any lands, tenements or hereditaments, "shall be manifested and proved by some writing, signed by the party who is by law to declare such trust, or by his last will in writing," or else they shall be utterly void. The eighth section excepts from the effect of that statute trusts which arise or result by the implication or construction of law,[3] while the ninth section requires that all grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will or devise, or else shall be utterly void and of no effect.[4] It will be observed that under this statute a trust need not be created by writing, but it must be evidenced by writing.[5] It may be proved by any writing in which the fiduciary relation between the parties and the terms can be clearly read.[6] The evidence must not only show that there is a trust, but also what the trust is. Courts will not execute trusts if their

[1] White v. Douglas, 3 Seld. 569.

[2] Mellican v. Mellican, 24 Tex. 440; Foy v. Foy, 2 Hayw. (N. C.) 131. And see Barrell v. Hanrick, 42 Ala. 60; Bates v. Hurd, 65 Me. 180.

[3] A resulting trust is not affected by the Statute of Frauds. Ward v. Armstrong, 84 Ill. 151.

[4] 29 Car. II., ch. 3, §§ 7, 8, 9. See Smith v. Hollenback, 51 Ill. 223; Hall v. Congdon, 55 N. H. 104; Barnes v. Taylor, 27 N. J. Eq. 259.

[5] Steere v. Steere, 5 Johns. Ch. 1; Johnson v. Delaney, 35 Tex. 42; Bedilian v. Seaton, 3 Wall. Jr. 279; Kingsbury v. Burnside, 58 Ill. 310; McClellan v. McClellan, 65 Me. 500. Mr. Perry, in his work on Trusts, §§ 80, 81, notices the change in the wording of the seventh section in several of the States, to the effect that "the trust must be created or declared by an instrument in writing signed by the party," and upon a review of the authorities concludes that the words "created and declared" are equivalent to "manifest and proved," and do not change the construction put upon the English statute.

[6] Baylies v. Payson, 5 Allen, 473; Bragg v. Paulk, 42 Me. 502; Fisher v. Field, 10 Johns. 505; Raybold v. Raybold, 20 Pa. St. 308.

nature, and the particular persons who are to take as beneficiaries, and the portions in which they are to take, cannot be ascertained.[1] All these particulars must appear from the writings signed by the party.[2] But courts seek for the intention of the parties, however informal or obscure the language may be, and if a trust can fairly be implied from the language used, as the intention of the parties, that intention will be executed.

§ 147. **Powers are of two Sorts**, namely: those which existed at common law, being simple powers of attorney to act as the agent or attorney for another, and those which derive their origin and character directly from the doctrine of uses, being powers of appointment. The latter, of course, are to be considered here. Simple powers of attorney to execute deeds will be treated of in a future chapter.[3]

§ 148. **Power of Appointment Defined.**—Writers have not been entirely agreed in their definition of such powers. It seems to have been found difficult to convey any definite idea of what is embraced under the term by any single abstract proposition on the subject, although it has been frequently attempted. The definition given by Mr. Williams, in his treatise on the Law of Real Property, is, "Methods of causing a use, with its accompanying estates, to spring up at the will of any given person."[4] Others have defined a power to be, "the right to designate the person who is to take a use:"[5] "a right to limit a use;"[6] "an authority enabling a person, through the medium of the Statute of Uses, to dispose of an interest vested either in

[1] Steere v. Steere, 5 Johns. Ch. 1; Perry on Trusts, § 83; Lewin on Trusts, 46; Leman v. Whitley, 4 Russ. 423; Harper v. Phelps, 21 Conn. 257.

[2] The nature of the written evidence and the signing required by the statute of frauds have been considered in a former chapter. *Ante*, §§ 4, 5, 6, 7. A mere memorandum upon a ledger is not a sufficient writing, under the statute. Homer v. Homer, 107 Mass. 82.

[3] *Infra*, chap. III, art. VI.

[4] 1 Williams on Real Prop. 272.

[5] Co. Litt. 271, a, Butlers' n. 231.

Kent's Com. 316.

himself or another."[1] To these may be added the following: An authority retained by or conferred upon a person to dispose of real estate, or to create, transfer or limit some estate or interest therein, or charge thereon, which the owner granting or reserving such power might himself lawfully do.[2] Powers are to be distinguished from trusts. As will be noticed, a simple power is never imperative; it leaves the act to be done at the will of the party to whom it is given, while trusts are always imperative, and are obligatory upon the conscience of the party intrusted.[3]

§ 149. **Powers are Distinguished, first, as General and Particular Powers.**—A general power is one which may be exercised in favor of any person whom the donee may select, including himself. A particular power is one which the donee of the power can exercise only in favor of particular objects; as, for instance, a power to appoint land amongst the children of A.

§ 150. **These are Divided again into Powers Collateral, Appendant and in Gross.**—Collateral powers are those in which the donee has no estate in the land; as where an estate is limited to the use of A., with power to B. to revoke that use and limit the property to the use of C. A power appendant is one which is strictly dependent upon the estate limited to whom the power is given, and the exercise of which will affect his interest; as where a power is given to a tenant for life to grant leases in possession.[4] Powers in gross are those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest; as where a power is given to a tenant for life to

[1] Sugd. Pow. 82.

[2] A power is not an estate, but it is a mere authority enabling a person through the medium of the Statute of Uses to dispose of an interest in real property vested either in himself or in another person. Burleigh v. Clough, 52 N. H. 267.

[3] Brown v. Higgs, 8 Ves. 570; Tucker v. Tucker, 1 Seld. 410. See Brewster v. Striker, 2 Comst. 20.

[4] Sugd. Pow., ed. 1856, 107.

create a term of years which is to commence after his death.[1]

§ 151. **The Creation of a Power** may be either by deed or will, by grant to the grantee, or reservation to the grantor.[2] And no formal words are necessary in either case. Any words which clearly indicate an intention to create a power are sufficient for that purpose.[3] The creation, execution and destruction of powers, all depend upon the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention.[4]

§ 152. **Of the Execution of Powers.**[5]—The first point to be noticed is, that the exercise of a power must not tend to create a perpetuity.[6] In the application of this principle the distinction is to be observed between those powers which are general and those which are particular. As to general powers, the rule is simply that the exercise of the power must not create a limitation which, at the time of its exercise, is obnoxious to the rule against perpetuities. But a limitation created in the exercise of a particular power is to be read as if it had been inserted in the instrument creating the power at the time when that instrument came into operation. And the validity of the execution of the power then turns upon the question as to whether the limitation so read tends to a perpetuity.[7]

§ 153. **Who may Execute.**—Every person, capable of disposing of an estate vested in himself, may exercise a power, or direct a conveyance of land. And many persons, disqualified from acting for themselves, such as infants,

[1] Watkins Conv. 260.

[2] 4 Kent's Com. 319.

[3] Dorland v. Dorland, 2 Barb. 80; Jackson v. Veeder, 11 Johns. 169.

[4] Hawkins v. Kemp, 3 East. 441; Jackson v. Veeder, 11 Johns. 169; Gorin v. Gordon, 38 Miss. 210.

[5] As to statutory form of executing power. See Stimson's Amer. Stat., § 1659.

[6] Goodtitle v. Pettoe, Fitzg. 299; Sugd. Pow. 191. And see Marlborough v. Godolphin, 1 Eden, 404.

[7] Doe v. Cavendish, 4 T. R. 741, n; Spencer v. Marlborough, 3 Brown P. C. 232. See Rush v. Lewis, 21 Pa. St. 72.

aliens, married women and others, may yet exercise a power simply collateral.[1] And it seems that a *feme covert* may execute any kind of power, whether simply collateral, appendant or in gross: and it is immaterial whether it was given to her while sole or married.[2] The concurrence of her husband is unnecessary in any case.[3] She may even execute it in favor of her husband.[4] A naked authority conferred upon several persons cannot, as a rule, be exercised by part of them only.[5] But exceptions to this rule have been created by statute in many of the States, in case of the death or disqualification of any of the parties. And it is a general rule that where the persons having the power are vested with any interest in the estate,[6] or are charged with a trust relative to the estate, and depending upon such power, the power survives.[7] It may be added, that persons who are acting in an official or fiduciary capacity cannot, in general, appoint an attorney to act in their stead. A delegated authority cannot be again delegated, without the express consent of the party creating the power.[8]

§ 154. **Conditions Annexed to the Exercise of a Power must be Strictly Complied with.**—The person who creates a power has the undoubted right to create whatever checks he pleases to impose, to guard against its abuse.[9] Therefore, if a deed be expressly required, the power cannot be

[1] 4 Kent's Com. 3; Thompson v. Lyon, 20 Mo. 155. But, by statute, in New York an infant cannot exercise a power. 2 R. S., p. 1116, §§ 130 131.

[2] Sugd. Pow. 148-155; Armstrong v. Kerns, 61 Md. 364.

[3] Thompson v. Murray, 2 Hill (S. C.) Ch. 214; Armstrong v. Kerns, *supra*.

[4] 2 Washb. on Real Prop. 4th ed. 654; Ladd v. Ladd, 8 How. 27. And see New v. Potts, 55 Ga. 420.

[5] Wardell v. McDowell, 31 Ill. 364.

[6] Gray v. Lynch, 8 Gill, 403; Wilburn v. Spofford, 4 Sneed, 698.

[7] Co. Litt. 112, b; Osgood v. Franklin, 2 Johns. Ch. 20, 21; Peter v. Beverly, 10 Pet. 532, 564; Muldrow v. Fox, 2 Dana (Ky.), 79; Williams v. Otey, 8 Humph. 563. And see National Bank v. Eldridge, 115 Mass. 484.

[8] McCormick v. Bush, 38 Tex. 314.

[9] Ladd v. Ladd, 8 How. 10; Sugd. Pow. 205-262.

executed by a will;[1] and if the power is to be executedby will, it cannot be executed by any act to take effect in the life-time of the donee of the power.[2] But where no mode is defined in which a power is to be executed, it may be executed by deed or will, or simply by writing,[3] and a parol execution has been held sufficient.[4] But conditions annexed to a power, which evince no intention of actual benefit to the party in whose favor they are to be performed, and which are merely nominal, may be disregarded in the execution of a power; but in all other respects the intention of the donee of the power as to the mode, time and conditions of execution, must be observed, subject to the power of a court of equity to supply defective executions.[5] Thus a power to sell does not ordinarily confer a power to mortgage.[6] But the Supreme Court of Pennsylvania holds that "an absolute and unrestrained power to sell includes a power to mortgage."[7] So, a power to appoint to children, does not authorize an appointment to grandchildren.[8] The former scrupulous strictness, in regard to the forms prescribed in the execution of powers, particularly with respect to the attestation of instruments of appointment and

[1] Alley v. Lawrence, 12 Gray, 373.

[2] Ives v. Davenport, 3 Hill, 373.

[3] 4 Kent's Com. 330.

[4] Silverthorn v. McKinster, 12 Pa. St. 67.

[5] Bartlett v. Sutherland, 24 Miss. 395; Cleveland v. Boerum, 27 Barb. 252; Capal v. McMillan, 8 Port. 197; 2 Washb. on Real Prop. 317; Hetzel v. Barber, 69 N. Y. 1; Rakestraw v. Rakestraw, 70 Ga. 806. See Norcum v. Doench, 17 Mo. 98; Barber v. Cary, 11 N. Y. 397. The intention is to be determined from the instrument creating the power. Guion v. Pickett, 42 Miss. 77. And see Clark v. Hornthal, 47 Miss. 434.

[6] Patapsco Guano Co. v. Morrison, 2 Woods, 395; Bloomer v. Waldron, 3 Hill, 361; 2 Washb. on Real Prop. 318; Wilson v. Maryland Life Ins. Co., 60 Md. 150. A power to sell is not a power to exchange. Hampton v. Moorhead, 62 Iowa, 91.

[7] Zane v. Kennedy, 73 Pa. St. 182. A power to executors to operate certain factories so long as in their discretion it could be done without injury to the interests of the estate, held not to imply a power to sell. Downing v. Marshall, 1 Abb. (N. Y.) Ct. App. 525.

[8] Horwitz v. Norris, 49 Pa. St. 217.

revocation, has relaxed in some degree.[1] But a condition attached to the execution of a power, requiring the consent of some particular person to be first obtained, and like conditions, must be strictly complied with.[2]

§ 155. **Power need not be Referred to.**—The power may be executed without referring to it, provided it appear that the donee had in view the subject of the power.[3] Thus, if a person having a general power to appoint by will devise the land itself, as owner of it, without reference to his authority, his intention to execute the power is clear, and the land will pass. But, if the donee of a power refers neither to the power nor to the property to which it is subject, it will be presumed, as a general rule, that he did not intend to execute the power, unless the will would otherwise be inoperative, and the intention to execute the power thus becomes manifest.[4] Where there is an interest and a power existing together in the same person, over the same subject, and an act be done without reference to the power, it will be applied to the interest and not to the power,[5] unless an intent to execute the power may be clearly inferred.[6] It has been held that where a person, having a life estate with power to appoint the fee, makes a conveyance in fee, this is a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument cannot otherwise be satisfied.[7]

[1] Ladd v. Ladd, 8 How. 30-40.

[2] Lancashire v. Lancashire, 2 Phillips, 657; Kissam v. Dierkes, 49 N. Y. 602.

[3] Sugd. Pow. 289; 4 Kent's Com. 334; 2 Washb. on Real Prop. 320; Coryell v. Dunton, 7 Pa. St. 530; Reilly v. Chouquette, 18 Mo. 220; Hutton v. Benkard, 92 N. Y. 295; Weir v. Smith, 62 Tex. 1.

[4] Blagge v. Miles, 1 Story, 426; 4 Kent's Com. 335; Amory v. Meredith, 7 Allen, 397; Owen v. Switzer, 51 Mo. 322. And see Collier's Will, 40 Mo. 287; White v. Hicks, 33 N. Y. 383. But where the maker has an estate which will pass, without executing the power, and the instrument is silent on that point, in the case supposed the law will presume that he intended to convey such estate and no more. Pease v. Pilot Knob Co., 49 Mo. 124; Towles v. Fisher, 77 N. C. 437.

[5] Jones v. Wood, 16 Pa. St. 25.

[6] Owen v. Ellis, 64 Mo. 77.

[7] Campbell v. Johnson, 65 Mo. 439.

§ 156. **The Appointee of a Power takes under the Original Deed:** and the estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power.[1] This rule, however, applies only to certain purposes, and between the parties, and does not interfere with intervening rights of others.[2] A deed under a power must be recorded, when deeds in general are required to be recorded, the same as any other deed.[3]

§ 157. **Equity Jurisdiction over the Execution of Powers.**—Where the manifest intention has been to execute a power, but the act declaring such intention was not an execution of the power in the prescribed form, courts of equity have been in the habit, in certain cases, of aiding the defective execution of the power. But equity never interposes, except where there is merely a defect in matter of form, and where the intent of the donor will be accomplished by carrying the execution into effect.[4] It will not supply the total want of any execution of it,[5] unless the power be coupled with a trust.[6]

§ 158. **The Suspension and Destruction of Powers.**—In the first place, it may be remarked, that powers simply collateral cannot be destroyed or suspended by any act of the donee.[7] But powers appendant and in gross may, as a general proposition, be released by the donee or owner of the power to one having an estate of freehold in the land, and a total alienation of his estate will extinguish them. Thus, if a tenant for life, with a power to grant leases in possession, conveys away his life estate, the power is gone; for

[1] Co. Litt. 113; 2 Prest. Abst. Tit. 275; Roach v. Wadham, 6 East, 289.
[2] 4 Kent's Com. 338.
[3] Jackson v. Davenport, 20 Johns. 537-553.
[4] Sugd. Pow. 88; Story's Eq. Jur., §§ 169-175; Wilkinson v. Getty, 13 Iowa, 159.
[5] *Ibid.*
[6] Tucker v. Tucker, 1 Seld. 410; Brewster v. Strikers, 2 Comst. 20.
[7] Digge's Case, 1 Rep. 173, a; Co. Litt. 237, a, 265, b; Sugd. Pow. 50, 67; Willis v. Shorral, 1 Atk. 474.

the exercise of it would be derogatory to his own grant.[1] But if the duty of the donee requires him to exercise a power at any future time, he cannot, in general, extinguish it by a release.[2] The suspension of a power can only occur in cases of powers appendant, and will happen where the exercise of the power would be in derogation of some previous estate or interest created under the power. This is illustrated in the case of a tenant for life, with a power of appointment and revocation, where, instead of conveying his whole estate, he demised the land for ninety-nine years, if he should live so long, to secure an annuity; in which case it was held that the power was suspended: he could not, by afterwards executing the power, defeat this demise, it having been made for a good consideration.[3]

ARTICLE XII.

COVENANTS FOR TITLE.

SECTION.

160. Covenant defined—construction.
161. Express and implied covenants.
162. Real and personal covenants distinguished.
163. The covenants usually contained in deeds.
164. The covenants of seizin and right to convey.
165. The covenant of seizin is broken, when.
166. The covenant against incumbrances.
167. What constitutes a breach of covenant against incumbrances.
168. The covenant of warranty.
169. Estoppel by warranty.
170. What constitutes a breach of the covenant of warranty.
171. Special warranty.

[1] Tud. Lead. Cas. 294; Doug. 292; 4 Kent's Com. 347; Burt. on Real Prop., § 180; 2 Washb. on Real prop., 4th ed., 309.

[2] Williams on Real Prop. 296; Cruise Real Prop., ch. XIX; 4 Kent's Com. 346.

[3] Bringloe v. Goodson, 4 Bing. New Cas. 734; Goodright v. Cator, 1 Doug. 477.

172. The covenant for further assurance.
173. Implied covenants.
174. Of dependant and independant covenants.
175. The measure of damages recoverable for breach of covenant of seizin.
176. Damages recoverable for breach of covenant against incumbrances.
177. Damages for breach of covenant of warranty.

§ 160. **Covenant Defined—Construction.**—A covenant is defined to be, "an agreement between two or more persons entered into in writing under seal, by which either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things."[1] No particular form of words is necessary to create a covenant. Whatever shows the intention of the parties to bind themselves to the performance of a stipulation may be deemed a covenant, without regard to the form of expression;[2] and that construction is to be preferred which renders the whole operative.[3] But where a grantor in a deed covenants "for his heirs, executors and administrators," such covenant cannot, by construction, be made to apply to him; and no recovery can be had against him in a court of law. It charges his estate only in the hands of his legal representatives.[4] It may be observed, that the covenants for title in a deed constitute no part of the conveyance, but are separate contracts: the title passes independently of them.[5]

[1] Bouv. L. Dic. *Covenant.*

[2] Trutt v. Spotts, 87 Pa. St. 339; Taylor v. Preston, 79 Pa. St. 436; Jackson v. Zwart, 20 Johns. 85; Gardiner v. Corson, 15 Mass. 504; Johnson v. Hollensworth, 48 Mich. 140.

[3] Halloway v. Lacy, 4 Humph. 468. In construing a covenant, where there is doubt or ambiguity, the construction must be most favorable to the party in whose favor the covenant is made, and most strongly against the party imposing such covenant upon himself. Gifford v. First Presbyterian Society, 56 Barb. (N. Y.) 114.

[4] Traynor v. Palmer, 86 Ill. 477.

[5] When a husband joins with his wife in a conveyance of the separate property of the wife, such conveyance containing covenants of warranty, the husband is bound by the covenants. Griner v. Butler, 61 Ind. 362.

§ 161. **Covenants in Deeds are either Express or Implied.**—Express covenants are those which are created by the express words of the parties to the deed, declaratory of their intentions.[1] Implied covenants are those which arise by intendment and construction of law from the use of certain words; as, for instance, "grant" or "demise,"[2] which will be treated of hereafter. Express covenants are regarded with greater strictness than those which are implied.[3]

§ 162. **Covenants are further Distinguished as Either Real or Personal.**—A real covenant is one which is so connected with the realty that the owner thereof is entitled to its benefits or bound to its performance, whether a party to the deed or not.[4] A personal covenant is one which binds only the covenantor and his personal representatives, in respect to assets, and can be taken advantage of only by the covenantee.[5] The consequences growing out of this distinction are, that real covenants run with the land until broken, or, in other words, may be transferred from one grantee to another, to be enforced by or against the owner of the estate, when broken;[6] while personal covenants are broken, if at all, simultaneously with the making of the covenant, and the cause of action is at once created in favor of the covenantee to recover his damages.[7] When broken, a covenant becomes what in law is called a *chose in*

[1] Platt on Conv. 25.

[2] Bacon Abridg. *Covenant*, B.; Williams v. Burrell, C. B. 402; 4 Kent's Com. 473.

[3] Shubrick v. Salmond, 3 Burr. 1639.

[4] Fitzherbert, Nat. Brev. 145; Shep. Touch. 161; Co. Litt. 384, b; Stearns, Real Act. 134; 4 Kent's Com. 472; 2 Bl. Com. 304; Robbins v. Webb, 68 Ala. 393; Fitch v. Johnson, 104 Ill. 111. To make a covenant run with the land, it is necessary, first, that it should relate to and concern the land, and secondly, that there should be some privity of estate between the covenantor and the covenantee. A covenant real is and can only be an incident to land. Wheeler v. Schad, 7 Nev. 204; Plymouth v. Carver, 16 Pick. 183.

[5] Fitzherbert, Nat. Brev. 340.

[6] Redwine v. Brown, 10 Ga. 311.

[7] 4 Kent's Com. 471, 472; 1 Smith's Leading Cas., 5 Am. ed., 174; Rawle on Cov., 4th ed., 318.

action, which, in general, cannot be transferred from one to another to be taken advantage of by the transferee in his own name.[1] All covenants for title are real covenants,[2] and in England may be sued on by any assignee into whose hands the estate may come; but in most of the United States, as will be further noticed, such covenants only as are future in their operation, or refer to something future, are held to run with the land. Since a covenant in the present tense, as one which vouches for the existence of certain facts at the time the covenant is made, is broken, if at all, simultaneously with the making thereof, it is thus placed in the same category with, and is frequently spoken of as, a personal covenant, although in other respects it may be in the nature of a real covenant.[3]

§ 163. **The Covenants Usually Contained in Deeds** are those of seizin, right to convey, against incumbrances, of warranty, for quiet enjoyment, and for further assurance; all of which will be considered under their appropriate heads. It may be observed, in the first place, that, in the conveyance of real estate, there is no warranty of title, as in the transfer of chattels, unless covenants are contained in the deed.[4] And, therefore, a purchaser of land who takes a conveyance without covenants respecting the title, has no remedy on failure of title, either in law or equity, if there be no fraud on the part of the vendor.[5]

[1] *Ibid.* Covenants that do not run with the land may be assigned in equity, so as to pass the right to enforce them, by action in the name of the covenantee, to the use of the assignee. Hagar v. Buck, 44 Vt. 285.

[2] Rawle on Cov. 313; 4 Kent's Com. 473; Dickinson v. Hoomes, 8 Gratt. 396; Booth v. Starr, 1 Conn. 244; Withy v. Mumford, 5 Cow. 137; Moore v. Merrill, 17 N. H. 80; Slater v. Rawson, 1 Metc. 450; White v. Whitney, 3 Metc. 81; Chase v. Weston, 12 N. H. 413; Claycomb v. Munger, 51 Ill. 373.

[3] The Supreme Court of New Jersey, held that a covenant that confers an immediately permanent and beneficial effect on the use to which real estate is designed to be applied will run with the title. The Nat. Union Bank v. Segur, 39 N. J. L. 173.

[4] Scott v. Scott, 70 Pa. St. 246; Co. Litt. 386, a.

[5] Maney v. Porter, 3 Humph. 347; Murray v. Ballow, 1 Johns. Ch. 566; Commonwealth v. McClanachan, 4 Rand. (Va.) 482.

§ 164. **The Covenants of Seizin and Right to Convey.** —The covenant of seizin is an assurance to the grantee that the grantor has the estate, in quantity and quality, which he undertakes to convey;[1] and the covenant of right to convey is in effect the same.[2] A grantor who was not seized had no right at common law to convey the estate,[3] and it was to this that the covenant of right to convey was designed to relate.[4] It seems that in England the covenant of *seizin* or *lawful seizin* is satisfied only by *indefeasible seizin*, and is regarded as a real covenant that will run with the land, and may be sued upon by an assignee when broken.[5] And the same doctrine has been adopted in several of the States, among which are Indiana[6] and Iowa.[7] In Ohio, it is held that the covenant of seizin, when the covenantor is in possession and claiming title, is a real covenant running with the land. But where the covenantor is not in possession, and the title is defective, it is broken as soon as made, and never attaches to the land, being in the nature of a personal covenant.[8] In Maine, the statute gives the assignee a

[1] Platt on Conv. 306; Howell v. Richards, 11 East. 642; Pecare v. Chouteau, 13 Mo. 527.

[2] Griffin v. Fairbrother, 10 Me. 91; Prescott v. Trueman, 4 Mass. 627; Raymond v. Raymond, 10 Cush. 134. But see Triplett v. Gill, 7 J. J. Marsh. 432; Richardson v. Dorr, 5 Vt. 21. And in England it is held not necessarily the same as the covenant of seizin, as it concludes the capacity of the grantor to convey. Chamberlain v. Ewer, 2 Bulstr. 12; Cro. Jac. 358.

[3] *Ante*, § 24.

[4] 3 Washb. on Real Prop. 649. Real covenants in a deed of land do not pass to an assignee where no title to the land passes by the deed, the grantor having no capacity to convey. Randolph v. Kinney, 3 Rand. (Va.) 394.

[5] Rawle on Cov. 20; Kingdon v. Nottle, 1 Maule & S. 355; *s. c.*, 4 *Id.* 53.

[6] Martin v. Baker, 5 Blackf. 232; Coleman v. Lyman, 42 Ind. 289.

[7] Knadler v. Sharp, 36 Iowa, 322. It is also held in Iowa that the covenant of seizin runs with the land, and is divisible, so that if the land be sold in parcels to different purchasers, each may maintain an action upon the covenant. Schofield v. Homestead Co., 32 Iowa, 317.

[8] Backus v. McCoy, 3 Ohio, 211; Devore v. Sunderland, 17 Ohio, 52. And see Great Western Stock Co. v. Saas, 24 Ohio St. 542.

right to maintain an action upon the covenant of seizin.[1] But in a majority of the States the covenant of *seizin* or *lawful seizin* is satisfied by possession under claim of right, and is not a covenant that runs with the land.[2] Though the covenant of *indefeasible seizin* is everywhere held to run with the land and to apply to all titles adverse to that of the grantor.[3]

§ 165. **The Covenant of Seizin is Broken, when.**—The covenant of seizin of whatever form is broken at the time of the execution of the deed, if the grantor has no possession either by himself or another.[4] The authorities all agree that, where the grantor is actually out of possession at the time of making the deed, it is a breach of the covenant of seizin; but the question has arisen, and in substance, though in another form, presents the same difficulty as was discussed in the preceding section, whether possession alone,

[1] Rev. Stat. 1857, ch. 82, § 16.

[2] Bartholomew v. Candee, 14 Pick. 167; 4 Kent's Com. 471, 472; 1 Smith Lead. Cas., 5th Am. ed., 174; Clark v. Swift, 3 Mete. 390, 392; McCarty v. Leggett, 3 Hill, 135; Thayer v. Clemence, 22 Pick. 490; Mitchell v. Warner, 5 Conn. 497; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 438; Slater v. Rawson, 1 Mete. 450; Catlin v. Hurlburt, 3 Vt. 403; Morrison v. Underwood, 20 N. H. 369; Kincaid v. Brittain, 5 Sneed, 119; Swasey v. Brooks, 30 Vt. 692; Hamilton v. Wilson, 4 Johns. 72; Donnell v. Thompson, 10 Me. 170; Mott v. Palmer, 1 Comst. 573; Wilson v. Cochran, 46 Pa. St. 229; Salmon v. Vallejo, 41 Cal. 481; Dale v. Shively, 8 Kan. 276; Brady v. Spurck, 27 Ill. 478; King v. Gilson, 32 Ill. 348; Baker v. Hunt, 40 Ill. 265; Richard v. Bent, 59 Ill. 43. The latter case was erroneously cited by that usually accurate writer, Mr. Washburn, in his treatise on Real Property, as establishing the doctrine that the covenant of seizin runs with the land. (See 3 Washb. Real Prop., 4th ed., 650.) Though expressly deciding that the covenant against incumbrances does run with the land, and may be sued on by an assignee, it reaffirms the doctrine of the earlier cases as to covenants of seizin. And see Schofield v. Iowa Homestead Co., 32 Iowa, 317.

[3] Dickson v. Desire, 23 Mo. 151. The court in this case discusses the general question as to simple covenants of seizin, and, it would seem, arrive at the same conclusion as the Ohio courts, that the covenants run with the land. See Garfield v. Williams, 2 Vt. 327; Abbott v. Allen, 14 Johns. 248.

[4] 4 Kent's Com. 471; Smith Lead. Cas., 5th Am. ed., 159; Walker Am. Law, 382; 3 Washb. on Real Prop. 650; Foote v. Burret, 10 Ohio, 332; Dickey v. Weston, 61 N. H. 23. And see Seculer v. Fox, 51 Mich. 92.

at the time of making the deed, is sufficient to make good the covenant of seizin. In other words, whether a subsequent eviction by one having a better title will give the covenantee a remedy upon the covenant. As will be seen, this involves the question, whether the covenant is one *in presenti* or runs with the land, in reference to which there has been much controversy. If it is limited to the mere fact of possession under claim of right, then such possession will support it; but if construed to be a covenant for the title, a subsequent eviction by one having a paramount title would constitute a breach. In Massachusetts, it was held that, to sustain a covenant of seizin and right to convey, which are synonymous, it was not necessary that the covenantor should be seized of an indefeasible title, but that a *seizin in fact* was sufficient, whether he gained it by his own act of disseizin or was in under a prior disseizor.[1] The courts of New Hampshire,[2] Vermont[3] (seemingly from the wording of the statute),[4] Connecticut,[5] Iowa[6] and Tennessee,[7] dissent from this doctrine, and give to the covenant of seizin almost the same effect as a covenant of warranty possesses. But a majority of the States seem to follow the Massachusetts rule, or at least a modification of it.[8] All of the cases agree that where a grantor covenants to convey an indefeasible estate possession alone will not be sufficient, but it is regarded as a real covenant for title,[9] and runs with the

[1] Marston v. Hobbs, 2 Mass. 433; Raymond v. Raymond, 10 Cush. 134. And see Slater v. Rawson, 1 Mete. 450.

[2] Parker v. Brown, 15 N. H. 187; Partridge v. Hatch, 18 N. H. 498.

[3] Richardson v. Dorr, 5 Vt. 19; Mills v. Catlin, 22 Vt. 106.

[4] Catlin v. Hurlburt, 3 Vt. 403.

[5] Gilbert v. Bulkley, 5 Conn. 262; Lockwood v. Sturtevant, 6 Conn. 374.

[6] Brandt v. Foster, 5 Iowa, 295.

[7] Kincaid v. Brittain, 5 Sneed, 119.

[8] Wilson v. Widenham, 51 Me. 566; Devore v. Sunderland, 17 Ohio, 52; Montgomery v. Reed, 69 Me. 510. And see cases cited *supra*, § 164; Rawle on Cov., 4th ed., 76; 3 Washb. on Real Prop. 655; Westrope v. Chambers, 51 Tex. 187.

[9] Prescott v. Trueman, 4 Mass. 631; Pierce v. Johnson, 4 Vt. 247; Collier v. Gamble, 10 Mo. 472; Smith v. Strong, 14 Pick. 132.

land.[1] It has been held by some courts that the mere existence of a paramount title whether asserted or not will amount to a breach of this covenant; though the covenantee can recover only nominal damages until there has been a hostile assertion of the paramount title.[2] But other courts have held that, where possession is given under the deed, a covenant of seizin is not broken until eviction.[3]

The covenant of seizin is also broken by the existence of an outstanding estate,[4] a material deficiency in the amount of land,[5] non-existence of the land described,[6] the existence of buildings, fences or other fixtures on the premises belonging to other persons who have a right to remove them,[7] concurrent *seizin* in another as tenant in common,[8] or adverse possession of a part by a stranger.[9] But it has been held that the existence of an easement or incumbrance upon the land, like a highway,[10] or a right of dower, or a mortgage, or an equitable lien, is not a breach of the covenant of *seizin* if possession has not been taken under such mortgage.[11]

[1] *Ibid.* Maguire v. Riggan, 44 Mo. 512.

[2] King v. Gilson, 32 Ill. 356. If a grantee fail to take possession of unoccupied premises conveyed by his deed, or having taken possession abandons them, he can recover of his grantor nominal damages only for breach of his covenant of seizin, unless there was a hostile assertion of a paramount title. Cockrell v. Proctor, 65 Mo. 41.

[3] Great Western Stock Co. v. Saas, 24 Ohio St. 542; Scott v. Tiviss, 4 Neb. 133.

[4] Comstock v. Comstock, 23 Conn. 352; Mills v. Catlin, 22 Vt. 98.

[5] But see Mann v. Pierson, 2 Johns. 37; Pringle v. Witten, 1 Barry, 326; Kincaid v. Brittain, 5 Sneed, 123.

[6] Wheelock v. Thayer, 16 Pick. 68, 70; Bacon v. Lincoln, 4 Cush. 210; Basford v. Pearson, 9 Allen, 389.

[7] Mott v. Palmer, 1 Comst. 564, 572; West v. Stewart, 7 Pa. St. 122; Powers v. Dennison, 30 Vt. 752; Van Wagner v. Van Nostrand, 19 Iowa, 427; Burke v. Nichols, 2 Keyes, 671.

[8] Downer v. Smith, 38 Vt. 468.

[9] Wilson v. Forbes, 2 Dev. (Law) 35; Mott v. Palmer, 1 Comst. 564; Brandt v. Foster, 5 Iowa, 295; Wheeler v. Hatch, 12 Me. 389.

[10] Vaughn v. Stuzaker, 16 Ind. 338; Whitebeck v. Cook, 15 Johns. 483. Though it would be of a covenant against incumbrances. Kellogg v. Malin, 50 Mo. 496; Tuite v. Miller, 10 Ohio, 383.

[11] Rawle on Cov., 4th ed., 80; Reasoner v. Edmondson, 5 Ind. 393; Sedgwick v. Hollenbeck 7 Johns. 376; Stanard v. Elridge, 16 Johns. 254; Fitzhugh v. Croghan, 2 J. J. Marsh. 432.

And if the premises, when granted, are in the possession of another as tenant of the grantor, which was known to the grantee at the time the deed was made, such possession is not a breach of the covenants in the grantor's deed. The tenant becomes the tenant of the grantee, and the possession of the tenant his possession.[1]

§ 166. **The Covenant against Incumbrances** is one which has for its object security against those rights to, or interests in, the land granted, which may subsist in third persons, to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance.[2] It does not, as a general rule, run with the land, for if there be an incumbrance the covenant is broken as soon as made.[3] But incumbrances are so various in their description and character, that the same rule cannot be applied to all. Some are existing incumbrances when the deed is

[1] Lindley v. Dakin, 13 Ind. 388.

[2] Prescott v. Trueman, 4 Mass. 629; Carey v. Daniels, 8 Mete. 482; 2 Greenl. on Ev., § 242; Chapman v. Kimball, 7 Neb. 399. A vendor of land who conveys by deed containing a covenant against incumbrances, and takes the notes of the purchaser secured by deed of trust on the property for the unpaid purchase-money, is bound to protect the purchaser against any incumbrances that were on the land when he conveyed, before he can properly demand payment of the notes given for the purchase-money. Coffman v. Scoville, 86 Ill. 300.

[3] Clark v. Swift, 3 Mete. 392; Cathcart v. Bowman, 5 Pa. St. 317. Without regard to knowledge of the grantee. 2 Greenl. on Ev., § 242. Accordingly, if the covenant be broken in the life-time of the covenantee, or one holding the covenant, his executor or administrator must sue upon it, and not his heirs. Frink v. Bellis, 33 Ind. 135. See Potter v. Taylor, 6 Vt. 676; Richardson v. Dorr, 5 Vt. 9; Prescott v. Trueman, 4 Mass. 629; Chapel v. Bull, 17 Mass. 220; Garrison v. Sandford, 12 N. J. L. 261; Tufts v. Adams, 8 Pick. 547; Funk v. Voneida, 11 Serg. & R. 109; Stewart v. Drake, 9 N. J. L. 139; Wyman v. Ballard, 12 Mass. 304. But if the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry or expulsion from the premises or some disturbance in the possession. Anderson v. Knox, 20 Ala. 156. This case represents in some measure the English doctrine as to the effect of a covenant against incumbrances, where it is linked, as is always the case in England, with a covenant for quiet enjoyment, and where it is invariably held that a covenant against incumbrances is one operating *in futuro* and runs with the land. And see Rawle on Cov., 4th ed., p. 89.

made, and actually diminish and detract from the estate at the time. Of this class are permanent easements, or an existing right of way over the premises. Others may exist at the time of making the deed, but be inchoate so far as occasioning loss or damage to the purchaser is concerned; such as a right of dower, or a judgment which the creditor may never enforce. In the first instance, the covenant is broken as soon as made, and the covenantee may sue and recover the damages which the estate sustains by the existence of such permanent incumbrance. In the other, he can only recover nominal damages until the dower or lien shall be enforced against the estate, or he has paid or satisfied the same.[1] In Iowa, though the covenant against incumbrances be *in presenti*, if a second or third grantor from the covenantee be called upon to discharge it, in order to protect his title, he may sue and recover upon the covenant what he has been required to pay.[2] In South Carolina, it is also held that, though the covenant may be broken at once upon the making of the deed, it runs with the land.[3] So also in Indiana.[4] But *contra* it Missouri.[5]

In Illinois, although a covenant of seizin is held not to run with the land, a remote grantee of lands may maintain an action in his own name, against the original grantor, on a covenant against incumbrances, where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee. In the leading case upon this subject, SHELDON, J., says: "Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages, and all the

[1] Clark v. Swift, 3 Mete. 390; Andrews v. Davidson, 17 N. H. 416; Runnels v. Webber, 59 Me. 488; Russ v. Perry, 49 N. H. 547; Prescott v. Trueman, 4 Mass. 629; Thayer v. Clemence, 22 Pick. 493; Whitney v. Dinsmore, 6 Cush. 127; Funk v. Creswell, 5 Iowa, 62; Tufts v. Adams, 8 Pick. 547; Wyman v. Ballard, 12 Mass. 304.

[2] Knadler v. Sharp, 36 Iowa, 236.

[3] McGrady v. Brisbane, 1 Nott. & M. 104.

[4] Martin v. Baker, 5 Blackf. 232; Dehority v. Wright, 101 Ind. 382.

[5] Blondeau v. Sheridan, 81 Mo. 545.

damages that can result from the breach have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *choses in action*. But, as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And, where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action*."[1] And in Ohio it is held that, where possession is given under a deed, the covenant against incumbrances runs with the land, and "if the first grantee conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself."[2] In Massachusetts, it was originally held that the covenant against incumbrances was not assignable and did not run with the land.[3] But this is now obviated by statute in that State, giving a right of action, for a breach of this covenant, in some cases "to the grantee, his heirs, executor, administrator, successors or assigns."[4] The Supreme Court of Nebraska has lately decided that the covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of a covenant of indemnity.[5] And the prevailing doctrine in this

[1] Richard v. Bent, 59 Ill. 43.

[2] Foote v. Burnet, 10 Ohio, 332.

[3] Whitney v. Dinsmore, 6 Cush. 124; Tufts v. Adams, 8 Pick. 547; Thayer v. Clemence, 22 Pick. 490.

[4] Gen. Stat., Chap. 89, § 17.

[5] The statute of limitations, therefore, commenced to run at once if no incumbrance existed at the time of the conveyance. Chapman v. Kimball, 7 Neb. 399.

country, as to *existing* incumbrances, seems to be that the covenant will not run with the land to subsequent owners so as to entitle them to sue for a breach thereof.[1]

§ 167. **The Covenant Against Incumbrances is Broken** by the existence of a right of dower,[2] though inchoate only,[3] by an outstanding mortgage, or deed of trust in the nature of a mortgage,[4] other than one which the covenantee is bound to pay,[5] by an outstanding life estate or term of years,[6] or an outstanding paramount title.[7] So an existing lien for taxes,[8] or of a judg-

[1] Rawle on Cov. 90.

[2] Scribner on Dower, 4; Jones v. Gardner, 10 Johns. 267; Bigelow v. Hubbard, 97 Mass. 195; Runnels v. Webber, 59 Me. 488; Walker v. Deaver, 79 Mo. 664.

[3] Porter v. Noyes, 2 Me. 22; Jenks v. Ward, 4 Metc. 412; Fletcher v. State Bank, 37 N. H. 397; Shearer v. Ranger, 22 Pick. 447; Russ v. Perry, 49 N. H. 550; Henderson v. Henderson, 13 Mo. 152. There is a *dictum* of Mr. Justice Story, in Powell v. Monson Manufacturing Co., 3 Mason, 355, maintainining a different doctrine, which was cited approvingly by the court in Bostwick v. Williams, 36 Ill. 69. But "this has been considered by courts in subsequent cases, with the respect and attention due to the *dicta* even of so eminent a jurist, but the opposite conclusion is now so firmly established that it can no longer be considered an open question." Russ v. Perry, 49 N. H. 550; Gazley v. Price, 16 Johns. 268.

[4] Bean v. Mayo, 5 Me. 94; Brooks v. Moody, 25 Ark. 452. But not so as to an adverse equitable claim to land. Marple v. Scott, 41 Ill. 50.

[5] Kinnear v. Lowell, 34 Me. 299; Estabrook v. Smith, 6 Gray, 572; Freeman v. Foster, 55 Me. 508.

[6] Grice v. Scarborough, 2 Speers (S. C.), 649; Van Wagner v. Van Nostrand, 19 Iowa, 422; Rawle on Cov., 4th ed., 98; Fritz v. Pusey, 31 Minn. 368.

[7] Prescott v. Trueman, 4 Mass. 627.

[8] Hill v. Bacon, 110 Mass. 388; Richard v. Bent, 59 Ill. 38; Long v. Moler, 5 Ohio St. 271; Mitchell v. Pillsbury, 5 Wis. 407. And see Cheney v. City Nat. Bank, 77 Ill. 562. In Connecticut, taxes are not a lien upon the land of a party taxed where he has other estate that can be found sufficient to pay the tax. Briggs v. Morse, 42 Conn. 258. *Query*, whether taxes assessed after a conveyance, but on a list existing at the time thereof, constitute an incumbrance. Pierce v. Brew, 43 Vt. 292. See Rundell v. Lakey, 40 N. Y. 513; Blossom v. Van Court, 34 Mo. 394. Held, not to constitute an incumbrance. Hutchins v. Moody, 30 Vt. 656. And see Barlow v. Nicholas Nat. Bank, 63 N. Y. 399. The right of the government to hold land for non-payment of taxes which have been assessed upon them is an incumbrance, within a covenant against

ment,[1] or any charge constituting a lien upon the estate and enforceable against it, would be a breach of the covenant.[2] Conditions, the non-performance of which by the grantee, may work a forfeiture of the estate,[3] or covenants which run with the land creating a charge thereon, are also incumbrances.[4] A party wall has been held to be in no just sense a legal incumbrance.[5] But the existence of a party wall, wholly on one of two contiguous lots of land, yet subject to right of enjoyment by the owner of the other, is a breach of the covenant against incumbrance.[6] So is the existence of a private right of way,[7] or a right of way for a railroad, al-

incumbrances, notwithstanding there is also a personal liability of the covenantor for the taxes. Cochran v. Guild, 106 Mass. 29. Held not broken by the fact that a portion of the land had been illegally sold for taxes. Cummings v. Holt, 56 Vt. 384.

[1] A judgment constituting a lien on land, which was outstanding at the time of sale of the land by covenantor, and which was enforced after sale to covenantee, by a legal conveyance of the land under it, is an incumbrance within the scope of the covenant against them. Jenkins v. Hopkins, 8 Pick. 346; Smith v. McCampbell, 1 Blackf. 100. So held, also, in a case where the grantee satisfied the judgment without waiting until he was evicted. Hall v. Dean, 13 Johns. 105. And see Holman v. Creagmiles, 14 Ind. 177.

[2] See Holman v. Creagmiles, 14 Ind. 177. So, an attachment upon land. Kelsey v. Remer, 43 Conn. 129.

[3] Jenks v. Ward, 4 Metc. 412. But in Estabrook v. Smith, 6 Gray, 572, an outstanding condition which may defeat the title to the estate granted is not deemed an incumbrance within the meaning of the covenant against incumbrances.

[4] In Kellogg v. Robinson, 6 Vt. 276, a covenant to maintain a division fence along the entire line between the granted premises and lands adjoining them, was held to be an incumbrance. And see Bronson v. Coffin, 108 Mass. 175, 187; Burbank v. Pillsbury, 48 N. H. 475. But it seems that a clause in the grantor's deed, that the grantee, his heirs and assigns, shall maintain a fence along the line of the granted land, is a personal obligation alone, and not an incumbrance binding the estate. Parish v. Whitney, 3 Gray, 516; Plymouth v. Carver, 16 Pick. 183.

[5] Hendricks v. Stark, 37 N. Y. 106; Musgrave v. Sherwood, 54 How. Pr. 338.

[6] Mohr v. Parmalee, 43 N. Y. Superior Ct. 320. See Giles v. Dugro, 1 Duer (N. Y.), 331. *Contra*, Bertram v. Curtis, 31 Iowa, 46.

[7] Wilson v. Cochrane, 46 Pa. St. 232; Butler v. Gale, 27 Vt. 739.

though the grantee has full knowledge of the incumbrance at the time he accepted the covenant.[1] And a pre-existing right to pass over the land to take water from a spring in it,[2] a right to cut and maintain a drain,[3] or other artificial water-course,[4] have all been held to be incumbrances within the covenant.[5]

In *Prescott* v. *Trueman*,[6] it was laid down somewhat broadly that a breach of the covenant against incumbrances will be caused by the existence of any easement or servitude whatever, to which the land is subject. But in some of the States, a public highway in use is not deemed an incumbrance. It is argued that "purchasers of property, obviously and notoriously subjected at the time to some right of easement affecting its physical conditions, take it subject to that right, without any express exceptions in the conveyance;"[7] though the courts of several of the States hold that a right of way for a railroad is an incumbrance for which a covenantee may recover, although cognizant of its existence when he took the deed.[8] And in Maine, Mas-

[1] Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 207.

[2] Harlow v. Thomas, 15 Pick. 68; Mitchell v. Warner, 5 Conn. 497.

[3] Smith v. Sprague, 40 Vt. 43.

[4] Prescott v. White, 21 Pick. 341.

[5] Butler v. Gale, 27 Vt. 739; Harlow v. Thomas, 15 Pick. 68; Williamson v. Hall, 62 Mo. 405; Beach v. Miller, 51 Ill. 206. A contrary doctrine has recently been held in Georgia, and to the effect that the existence of a public road, which was known to the vendee at the time of the purchase, does not constitute a breach of the covenant. Desvergers v. Willis, 56 Ga. 515.

[6] 4 Mass. 630.

[7] Kutz v. McCune, 22 Wis. 628. A purchaser of land, subject to an easement, will be presumed to have been willing to take the property subject to the burden as it was at the time of the purchase, when the easement is open, visible and of a continuous character. Such an easement, therefore, is not embraced in a covenant of special warranty. Janes v. Jenkins, 34 Md. 1; Scribner v. Holmes, 16 Ind. 142 (overruled in Burk v. Hill, 48 Ind. 52); Desvergers v. Willis, 56 Ga. 515.

[8] Van Wagner v. Van Nostrand, 19 Iowa, 422; Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 206; Kellogg v. Malin, 50 Mo. 500; *s. c.*, 62 Mo. 429; Williamson v. Hall, 62 Mo. 405; Kellogg v. Ingersoll, 2 Mass. 97; Prescott v. Trueman, 4 Mass. 627. See Harlow v. Thomas, 15 Pick. 66; Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322; Giles

sachusetts, New Hampshire and Connecticut a public highway is an incumbrance, and constitutes a breach of the covenants in a deed of the land over which it exists.[1] In Pennsylvania, the courts held a highway across the granted premises, which had existed thirty years, not to constitute an incumbrance, but that a private way would be an incumbrance.[2] In New York, the court intimated in the case of *Whitbeck* v. *Cook*,[3] that a public road was not an incumbrance. But this was only a *dictum*, and did not involve the decision of the case. In Indiana, it was originally held that a highway in actual use was not an incumbrance within the meaning of the covenant;[4] but the court, in a later case, after citing all the authorities on the subject, distinctly overrule what they term was an *obiter dictum* in the early case, and hold that a public street or road is an incumbrance.[5] The weight of authority and tendency of decisions seem to be in favor of the proposition that an existing public highway (whether used for railroad or otherwise) does constitute an incumbrance within the meaning of the covenant against incumbrances,[6] and that the fact of the incumbrance

v. Dugro, 1 Duer, 331; Hubbard v. Norton, 10 Conn. 431; Burke v. Hill, 48 Ind. 52.

[1] Haynes v. Young, 36 Me. 561; Kellogg v. Ingersoll, 2 Mass. 101; Prichard v. Atkinson, 3 N. H. 335; Hubbard v. Norton, 10 Conn. 431.

[2] Patterson v. Arthurs, 9 Watts, 152; Wilson v. Cochran, 46 Pa. St. 232. See Rawles on Cov., 4th ed., 100, and cases cited.

[3] 15 Johns. 483.

[4] Scribner v. Holmes, 16 Ind. 142.

[5] Burke v. Hill, 48 Ind 52.

[6] Burke v. Hill, 48 Ind. 58; Purcell v. Hannibal, etc. R. R. Co., 50 Mo. 504. "Was this right of way, then, an incumbrance upon the land? We think it was. It is true the authorities on this question are not harmonious, but we think the current holds such an easement to be an incumbrance, and that they are supported by the better reason." Beach v. Miller, 51 Ill. 206; Barlow v. McKinley, 24 Iowa, 69; Kellogg v. Malin, 50 Mo. 496. "But whatever weight may be due to these decisions (Pennsylvania and New York), it cannot be denied that the current of authority has set strongly the other way, and the ruling in Kellogg v. Ingersoll, 2 Mass. 101, has been sustained in nearly all the New England States, and it appears to be definitely settled there, that a public high-

being known to the grantee will be no bar to his recovery on the covenant.[1] Accordingly, in drawing conveyances, where there are known incumbrances of any kind, subject to which the purchaser agrees to take the property, these should be specially and expressly excepted from the covenants.

§ 168. **The Covenant of Warranty.**—The ancient English warranty was a convenant real, by which the grantor of an estate of freehold and his heirs were bound to warrant the title; and either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by paramount title.[2] But warranty in its original form, it is presumed, has never been known in the United States.[3] The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases.[4] The covenant of warranty in use in this country is an assurance, by the grantor of an estate, that the grantee shall enjoy the same without interruption, by virtue of par-

way does constitute, at law, a breach of this covenant." Rawle on Covenants, 4th ed., 104. But see Jordan v. Eve, 3 Va. L. J. 290. Liability to assessments for the opening of a street held a breach of the covenant in deed executed after the street was opened, though before assessment made. Fagan v. Cadmus, 46 N. J. L. 441; Cadmus v. Fagan, 47 N. J. L. 549.

[1] Butler v. Gale, 27 Vt. 739; Harlow v. Thomas, 15 Pick. 68; Williamson v. Hall, 62 Mo. 405; Beach v. Miller, 51 Ill. 206. The fact that both parties to a conveyance of a tract of land with a covenant against incumbrances have full knowledge of the existence of a valid outstanding incumbrance upon the land conveyed, is no reason, in the absence of fraud or mistake in procuring the covenant, why the purchaser and covenantee is not entitled to recover on the covenant. Gragg v. Wagner, 71 N. C. 216.

[2] Co. Litt. 365, *a*.

[3] The ancient common-law warranty has been superseded by personal covenants, and never had any practical existence in this country. Jones v. Franklin, 30 Ark. 631.

[4] 4 Kent's Com. 460. See Paxon v. Lefferts, 3 Rawle (Pa.), 67, n; Jourdan v. Jourdan, 9 Serg. & R. 268; Bates v. Norcross, 17 Pick. 14; Piatt v. Oliver, 3 McLean, 27; Foote v. Burnet, 10 Ohio, 322, note.

amount title.[1] It is the broadest and most effective covenant contained in American deeds, and, in several States is the only one in general use. It is a real covenant, and runs with the land into the hands of whoever becomes the owner thereof.[2] But when once broken, it stands upon the same ground as the covenants which are broken as soon as made.[3] It is to be remembered, however, that the covenant of warranty is, in most respects, the same as a covenant for quiet enjoyment,[4] and can be broken only by something tantamount to an eviction.[5]

§ 169. **Estoppel by Covenant of Warranty.**—The covenant of warranty is not only a covenant of indemnity for the loss of land, but often operates to create title by way of estoppel, by preventing the setting up of an otherwise good title.[6] As where one, having a title to land, conveys it with a covenant of general warranty, and afterwards acquires a title to the same, he is estopped to claim the land, and this extends to his second grantee in favor of the covenantee.[7]

[1] Rindskopf v. Farmer's Loan Co., 58 Barb. 36; Moore v. Lanham, 3 Hill (S. C.), 304.

[2] 3 Washb. on Real Prop., 4th ed. 660; Leary v. Durham, 4 Ga. 593; Dickinson v. Hoomes, 8 Gratt. 353; Claycomb v. Munger, 51 Ill. 373; Chandler v. Brown, 59 N. H. 370.

[3] Wilson v. Cochran, 46 Pa. St. 229.

[4] 4 Kent's Com. 472; 3 Washb. on Real Prop., 4th ed., 661; Caldwell v. Kirkpatrick, 6 Ala. 60; Townsend v. Morris, 6 Cowen, 126; Fowler v. Poling, 2 Barb. 300; Emerson v. Proprietors, 1 Mass. 466; Athens v. Nale, 25 Ill. 198; Bostwick v. Williams, 36 Ill. 70; Rea v. Minkler, 5 Lans. (N. Y.) 96; Scott v. Kirkendall, 88 Ill. 465. A covenant of warranty in a deed is more than a covenant for quiet enjoyment. It is an undertaking to defend, not merely the possession, but the land and the estate in it. Williams v. Wetherbee, 1 Aik. (Vt.) 233.

[5] *Infra*, § 170.

[6] Provided by statute in several States that every deed with general warranty and purporting to convey the fee-simple, is conclusive as against the grantor, his heirs and assigns. Stimson's Amer. Stat., § 1454.

[7] Walker's Amer. Law, 383; Jackson v. Stevens, 13 Johns. 316; Terrett v. Taylor, 9 Cranch, 53; Middlebury College v. Cheney, 1 Vt. 336; Burton v. Reeds, 20 Ind. 87; Knight v. Thayer, 125 Mass. 25; Jackson v. Murray, 12 Johns. 201; Somes v. Skinner, 3 Pick. 52; White v. Patten, 24 Pick. 324; Allen v. Sayward, 5 Me. 231. In King v. Gilson, 32 Ill. 353, the court, in commenting upon the effect of the covenant of war-

The effect is, that the title acquired by the grantor who has conveyed with warranty inures, *eo instanti* that he gains the title, to his grantee, and vests in him, or the grantee of such grantee, if with like covenants.[1] And, in some cases, an heir is rebutted from claiming, by another and better title, the land which his ancestor had conveyed with warranty, if the heir has received assets from his ancestor, the covenantor, sufficient to make good the warranty.[2]

§ 170. **What Constitutes a Breach of the Covenant of Warranty.**—It has been said that, to authorize a recovery upon the covenant of warranty or quiet enjoyment, there must be an eviction,[3] the technical meaning of which is dispossession by judgment of law. But by the weight of authority, and upon principle, nothing more is necessary to sustain an action than an ouster by title paramount, or law-

ranty in creating estates, remarks: "Whether the effect is produced by the way of estoppel, by remitter, or by operation of the Statute of Uses, has been a matter of much discussion." A covenant in a deed that the grantor will warrant the land against all persons claiming under him, does not estop him from setting up a title subsequently acquired by him by purchase or otherwise. Comstock v. Smith, 13 Pick. 116; Jackson v. Winslow, 9 Cowen, 13. A warranty deed, executed by a married woman, in accordance with the power conferred upon her by the Gen. Stats., ch. 108, § 3, of land in which a third person has life estate at the time, who afterwards conveys it to the grantor, is binding by way of estoppel upon her and her subsequent grantees to the same extent as if she was unmarried. Knight v. Thayer, 125 Mass. 25

[1] Knowles v. Kennedy, 82 Pa. St. 445; Crocker v. Pierce, 31 Me. 177, 182. But the rule that one who is bound by a general warranty cannot set up an after-acquired title, applies where the warranty is full, as against the warrantor, although it limits the persons against whose claims he warrants, as where he covenants against claims of himself and his heirs. Taggart v. Risley, 3 Oreg. 306.

[2] Cole v. Raymond, 9 Gray, 217; Bates v. Norcross, 17 Pick, 14, 21; Jones v. Franklin, 30 Ark. 631. When a father, having a life estate only, makes a deed in fee-simple for land, with warranty, his heirs, with or without assets, is rebutted by the warranty, except in cases where the rule of the common law is changed by statute, or where the heir can connect himself with the outstanding remainder or revision. Southerland v. Stout, 68 N. C. 446.

[3] Stewart v. Drake, 9 N. J. L. 131; Norton v. Jackson, 5 Cal. 262; Hannah v. Henderson, 4 Ind. 174.

ful disturbance.[1] Thus, if one having a legal claim seeks to enforce it by expelling the tenant in possession, it is not necessary for him to wait for a judgment and actual eviction by process of law. He may yield possession to the one who has his paramount title, and claim for a breach of the covenant.[2] So, in case of an incumbrance consisting in a mortgage, the entry of the mortgagee in presence of witnesses for breach of condition, and for the purpose of foreclosure, was held a breach of this covenant.[3] And such disturbances are also expressed in popular language, which is recognized by the

[1] Kellogg v. Platt, 33 N. J. L. 328, authorities reviewed; McGary v. Hastings, 39 Cal. 360; Glenn v. Thistle, 23 Miss. 42; Montgomery v. Reed, 69 Me. 510; Marbury v. Thornton (Va.), 1 S. E. Rep. 909. It has been held in New York that an actual eviction is necessary. Rindskopf v. Farmer's Loan Co., 58 Barb. 36. In Mississippi, in order to sustain an action on the covenant of general warranty there must be an actual eviction by judicial process, or a surrender of possession to a valid, subsisting paramount legal title asserted against the covenantee; or there must be a holding of the grantee out of possession by such title, so that he cannot enter. Dyer v. Britton, 53 Miss. 270. And see, to about the same effect, Jones v. Warner, 81 Ill. 344. The covenant can only be broken by something equivalent to an eviction or disturbance of the possession of the grantee. The mere existence of a paramount title in another is not of itself sufficient to constitute a breach. Scott v. Kirkendale, 86 Ill. 465. The fact that the grantor inadvertently included in the deed a certain tract to which he had no title, is an equitable defense to a suit on his covenant of warranty. Stewart v. Hadley, 55 Mo. 235. It is sufficient if the grantee is hindered or prevented from entering and enjoying the premises granted by one having a better right. Smith v. Scribner (Vt.), 7 Atl. Rep. 711.

[2] Hamilton v. Cutts, 4 Mass. 349; Kellogg v. Platt, 33 N. J. L. 328; Brandt v. Foster, 5 Iowa, 297; Loomis v. Bedel, 11 N. H. 74; Funk v. Creswell, 5 Iowa, 65; Peck v. Hensley, 20 Tex. 673; Clark v. McAnulty, 3 Serg. & R. 372; Estabrook v. Smith, 6 Gray, 572. See Claycomb v. Munger, 51 Ill. 376; McGary v. Hastings, 39 Cal. 360; Knepper v. Kurtz, 58 Pa. St. 484. The adverse paramount title must be not only superior to the title under which the land was held by him, under such deed, but also superior to the title of any other person. Crance v. Collenbaugh, 47 Ind. 256. Neither actual eviction nor its equivalent are necessary to the recovery of nominal damages for a breach. Mason v. Cooksey, 51 Ind. 519.

[3] White v. Whitney, 3 Metc. 81, 89; Tufts v. Adams, 8 Pick. 547; Furnas v. Durgin, 119 Mass. 500; Smith v. Dixon, 27 Ohio St. 471. In Sprague v. Baker, 17 Mass. 586, the tenant yielded to the claim of a prior mortgagee without

courts, by the term *eviction*. So, a purchaser may be evicted, although he continues in possession, if under a different title; as if he should subsequently hold under the true owner, either by inheritance or otherwise.[1] But if the grantee purchases an outstanding title, or yields to an adverse claimant without standing suit or being sued (unless, in case of a suit, he give notice to his grantor of the suit, so that he may defend it),[2] the burden of proof is upon such grantee to show that the adverse title was good,[3] and that the possession was surrendered only after claim or demand thereof.[4] The grantee has no recourse on the covenant of warranty or quiet enjoyment, where he has paid money to buy off a claim merely to save litigation.[5] The covenant extends to lawful disturbances only, and not to a mere trespass or a pretense of a claim or title which has no legal foundation.[6] And if the covenantor

[1] Succession of Coxe, 15 La. Ann. 514; Kellogg v. Platt, 33 N. J. L. 328; Hall v. Bray, 51 Mo. 288; McGary v. Hastings, 39 Cal. 360. See Mason v. Cooksey, 51 Ind. 519.

[2] Jackson v. Marsh, 5 Wend. 44. Notice to be effectual, need not be in writing. Miner v. Clark, 15 Wend. 425.

[3] Hall v. Bray, 51 Mo. 288; Hamilton v. Cutts, 4 Mass. 349; Claycomb v. Munger, 51 Ill. 377; Somers v. Schmidt, 24 Wis. 417; Smith v. Sprague, 40 Vt. 43; Merritt v. Morse, 108 Mass. 276; Ryerson v. Chapman, 66 Me. 557.

[4] Morgan v. H. & St. Jo. R. R. Co., 63 Mo. 129. To authorize a suit by the covenantee against the covenantor, for breach of a general warranty of title, there must have been some hostile assertion of the paramount title to which possession was yielded, or which was brought in. That a suit shall have been instituted is not necessary; but it is essential that the true owner shall have given notice, in some way, of his intention to assert his claim. The covenantee cannot, merely because he has ascertained that some other person holds a title superior to his own, abandon that possession which he received from the covenantor, and demand a return of his purchase-money. It is not sufficient that he shall be satisfied that the outstanding title is the true one, and, if asserted, cannot be resisted; because in point of fact, it may never be asserted, or if asserted in the future, the flow of time may have so ripened his possession that he can successfully combat it. Good faith, therefore, to his vendor, requires that he shall stand his ground until, in some way, he is called upon to surrender. Green v. Irving, 54 Miss. 450. And see Kansas Pacific R. R. Co. v. Dunmeyer, 19 Kan. 539.

[5] Caldwell v. Bower, 17 Mo. 564.

[6] Gleason v. Smith, 41 Vt. 296. No act of a mere stranger, though

do the acts, he must, in order to make it a breach of the covenants in his deed, do them under the claim and assertion of right.[1] Many circumstances have been held to be tantamount to an ouster in some of the States, and denied in others.[2] Thus, where one made a mortgage with covenants of warranty, and then conveyed the same estate absolutely, without notice of the mortgage, and thereby defeated the same, it was held a constructive eviction, and that the mortgagee might maintain an action upon the covenant in his deed, and rely upon those facts as tantamount to an eviction.[3] So, if the covenantee find another in possession under a paramount right when he takes his deed, he may have an action upon his covenant without being obliged to subject himself to the hazard of an action of trespass by first entering upon the premises and being ousted.[4] Likewise, satisfaction of a judgment in proceedings to enforce the assignment of dower in the land, was held equivalent to

under a pretense of a title which is not a valid one, will operate as a breach of this covenant. Brick v. Coster, 4 Watts & S. 499; Rawle on Cov., 4th ed., 134; Branger v. Mauciet, 30 Cal. 624. A covenant of warranty "against all persons claiming by, through or under the said D.," means only such persons as had valid claims, not pretenses without legal foundation and right. Gleason v. Smith, 41 Vt. 293.

[1] Sugden on Vendors, 84; Beebe v. Swartwout, 8 Ill. 181; Bostwick v. Williams, 36 Ill. 70; O'Keefe v. Kennedy, 3 Cush. 325. And see Mayor of New York v. Mabie, 3 Kernan, 151.

[2] See cases *pro* and *con.* cited in note to Foote v. Burnett, 10 Ohio, 317; Moore v. Vail, 17 Ill. 185; Reese v. McQuilkin, 7 Ind. 450; Gilman v. Haven, 11 Cush. 330; Pickett v. Pickett, 6 Ohio St. 525.

[3] Funk v. Creswell, 5 Iowa, 66; Curtis v. Deering, 12 Me. 499.

[4] Moore v. Vail, 17 Ill. 185; Clark v. Conroe, 38 Vt. 469; Grest v. Hodges, 3 Dev. 200; Rawle on Cov., 3d ed., 253, 255; Rex v. Creel, 22 W. Va. 373. But *contra*, as to the covenant for quiet enjoyment, Kortz v. Carpenter, 5 Johns. 120. But if such person is claiming under an inferior title, and is permitted by the grantee, and those deriving a title from or through him, to remain undisturbed until his adverse possession ripens into a good title, as against the grantee, the latter, or those claiming under him, cannot be allowed to recover upon the covenant of warranty for a failure of title, because they have lost their lands, not by title paramount existing at the time of executing the covenant, but by their own laches in suffering an imperfect and inferior claim of title to become a legal title, paramount to theirs. Rindskopf v. Farmers' Loan Co., 58 Barb, 36.

an eviction for the purpose of suit on the covenants.[1] So, also, the discharge of an incumbrance subsisting at the time of the conveyance and capable of being enforced.[2] It is not necessary that the act of eviction should extend to the whole premises granted; it will be a breach of such covenant if the covenantee is divested of any part of them. Thus, if a house or fence of another person was standing on land belonging to a grantor, and he sold the land with covenant of warranty, and afterwards the owner of the house or fence removed it, this would constitute a breach of the covenant.[3] So, an existing right in another to draw water from the premises by an aqueduct,[4] or the existence of a public or private way,[5] would be a breach of the covenant. But it has been held in Pennsylvania that when land is sold with general warranty, the opening of a public highway, by virtue of eminent domain, is not an eviction which will entitle the vendee to maintain an action for breach of the covenant.[6]

§ 171. **Special Warranty.**—The covenant thus far considered has been one of general warranty. The covenant may be special, and frequently is limited to certain persons or claims.[7] Thus, it is quite common to insert in deeds

[1] Magwire v. Riggan, 44 Mo. 512; Welsh v. Kibler, 5 S. C. 405.

[2] Kenney v. Norton, 10 Heisk. (Tenn.) 384.

[3] West v. Stewart, 7 Pa. St. 122; Funk v. Creswell, 5 Iowa, 88. But it is no breach of a warranty of a lot and the buildings thereon, that a part of the house believed to be thereon is, in fact, on the adjoining lot. Burke v. Nichols, 34 Barb. 430. But a condition in A.'s deed to B. against erecting buildings on a portion of the land, is a breach of covenant of warranty in B.'s deed to C. Kramer v. Carter, 136 Mass. 504.

[4] Clark v. Conroe, 38 Vt. 469; Lamb v. Danforth, 59 Me. 324; Day v. Adams, 42 Vt. 510.

[5] Lamb v. Danforth, 59 Mo. 324; Russ v. Steele, 40 Vt. 310; Haynes v. Young, 36 Me. 561; Harlow v. Thomas, 15 Pick. 66. Right of way for railroad is not a breach of covenant. Brown v. Young, 69 Iowa, 625. And held in New York that covenant of warranty is not broken by the existence of a public right of way over a portion of the land. Hymes v. Esty, 36 Hun, 147.

[6] Peck v. Jones, 70 Pa. St. 83.

[7] A purchaser of lands at public auction, made by a trustee, can only require a deed from the trustee with special warranty. Fleming v. Holt, 12 W. Va. 143.

of quitclaim a covenant against all persons claiming by, through or under the grantor. In this case, the covenant does not estop the grantor from claiming the land against his grantee, under and by virtue of a title acquired subsequent to his deed.[1] So, the covenants are often limited by the subject-matter of the grant. As where the deed only purports to convey the "right, title and interest of the grantor." Though, in such case, the grantor covenants that he is seized in fee of the premises, that they are free of all incumbrances, and that he will warrant them to the grantee against the lawful claims of all persons, the covenants relate only to such interest as the grantor had at the time,[2] and will not operate to convey an after-acquired title.[3] This doctrine is based upon the general proposition that the covenants cannot enlarge the premises of the grant.[4] Thus, where A. conveyed certain premises, "subject to a certain mortgage," therein specified, with covenant of general warranty, and against incumbrances, it was held that these covenants were limited and qualified by the exception, and that the existence of that mortgage was not a breach of the covenant.[5] But a respectable minority of the cases impugn the above doctrine, and hold that the thing warranted in such a deed is the land itself, and not simply the right and title of the grantor.[6]

[1] Jackson v. Winslow, 9 Cow. 13; Comstock v. Smith, 13 Pick. 116; Allen v. Sayward, 5 Me. 227; Trull v. Eastman, 3 Mete. 124; Western Mining Co. v. Peytona Coal Co., 8 W. Va. 406. Bucker v. Street, 15 Fed. Rep. 365. A covenant, though in substance like that above, *held* to be a general warranty under particular circumstances. Kimball v. Blaisdell, 5 N. H. 533. It is held in Wisconsin that covenants in a deed, whereby the grantor in terms covenants only "for his heirs, executors and administrators," omitting the words "for himself," are yet binding upon him. Hilmert v. Christian, 29 Wis. 104. But see *contra*, § 160.

[2] Ballard v. Child, 64 Me. 152; Allen v. Holton, 20 Pick. 458; Gee v. Moore, 14 Cal. 474; Kimball v. Semple, 25 Cal. 452; Blanchard v. Brooks, 12 Pick. 47; Raymond v. Raymond, 10 Cush. 134; Sweet v. Brown, 12 Metc. 175; Hall v. Chaffee, 14 N. H. 215; White v. Brocaw, 14 Ohio St. 344; Adams v. Ross, 30 N. J. L. 510; Brown v. Jackson, 3 Wheat. 449.

[3] *Ib.*; Butcher v. Rogers, 60 Mo. 138.

[4] Lamb v. Wakefield, 1 Sawyer, 251.

[5] Freeman v. Foster, 55 Me. 508.

[6] Brown v. Jackson, 3 Wheat. 449; Funk v. Creswell, 5 Iowa, 66; Hub-

§ 172. **The Covenant for Further Assurance** is one by which the covenantor undertakes to do such reasonable acts, in addition to those already performed, as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter.[1] It is a covenant which runs with the land.[2] It is resorted to, when inserted, rather as a means of enforcing a specific performance of the grantor's agreement to make a good title, than as a ground of a suit at law for its breach. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach.[3] This covenant is seldom used in this country.

§ 173. **Implied Covenants**, as we have previously observed, are those which arise by construction of law from the use of certain words and forms of expression, which are held to constitute an agreement, though no express covenant or agreement is connected with them.[4] Among the words which by the common law were held to imply covenants are, "give," "grant," "demise," and the like. The word "give," when used in a deed of feoffment, implied a covenant of warranty during the life of the grantor.[5] But when used in deeds deriving their effect from the Statute of Uses, it does not imply a covenant.[6] The word "grant" or

bard v. Apthorp, 3 Cush. 419; Loomis v. Bedel, 11 N. H. 74; Mills v. Catlin, 22 Vt. 104; Rowe v. Heath, 23 Tex. 614.

[1] Lamb v. Burbank, 1 Sawyer, 227; Platt on Cov. 341; 3 Washb. on Real Prop. 667.

[2] Colby v. Osgood, 29 Barb. 339.

[3] 2 Coke, 3 *a*; Platt on Cov. 353.

[4] For a concise statement of the different statutory provisions as to implied covenants, see Stimson's Amer. Stat., §§ 1500-1518.

[5] 2 Bl. Com. 300; Kent v. Welch, 7 Johns. 258; Stearns, Real Act. 123, 126.

[6] Allen v. Sayword, 5 Me. 230; Bates v. Foster, 59 Me. 157; Rawle on Cov., 468.

"demise," in a conveyance for a term of years, implied an absolute covenant for quiet enjoyment during the term, unless qualified by a more limited express covenant.[1] By Statutes 8 and 9, Vict. ch. 106, § 5, in England, the words "give" and "grant" no longer imply a covenant in law: but the word "demise" still retains this power;[2] and the word "lease" has been held to be equivalent to "demise" in creating an implied covenant.[3] These words imply a covenant against a paramount title, and against acts of the landlord which destroy the beneficial enjoyment of the premises.[4] It extends only to the possession, and a breach arises only from eviction by means of title.[5] In several of the States, it is provided by statute that no covenant is to be implied in any conveyance of real estate. But in New York, it is held that this statute does not abrogate the common law doctrine of implied covenants as applied to leases for years;[6] unless the leases are in fee or perpetuity.[7] A lease for years implies, on the part of the lessor, a covenant for quiet enjoyment, and on the part of the lessee, a covenant to pay rent.[8] In Missouri, it is provided by statute that "the words 'grant,' 'bargain,' 'sell,' in all conveyances in which any estate of inheritance in fee-simple is limited, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor for himself and his heirs, to the grantee, his heirs and assigns: First, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee-simple, in

[1] Barton on Real Prop., § 846.

[2] Williams on Real Prop., 367.

[3] Maule v. Ashmead, 20 Pa. St. 482; Ross v. Dysart, 33 Pa. St. 452; Hamilton v. Wright, 28 Mo. 200. But see Lovering v. Lovering, 13 N. H. 513; Barney v. Keith, 4 Wend. 502.

[4] Wade v. Halligan, 16 Ill. 507; Dexter v. Manley, 4 Cush. 24.

[5] Schuylkill, etc. R. R. v. Schmoele, 57 Pa. St. 273.

[6] Lynch v. Onondaga Salt Co., 64 Barb. 558.

[7] Carter v. Burr, 39 Barb. 59.

[8] Lynch v. Onondaga Salt Co., 64 Barb. 558; Kimpton v. Walker, 9 Vt. 198. But the implied covenant to pay rent passes to the assignee of the lease. Van Rensselaer v. Smith, 27 Barb. 104.

the real estate thereby granted. Second, that such real estate was, at the time of the execution of such conveyance, free from incumbrance done or suffered by the grantor, or any person claiming under him. Third, for further assurances of such real estate, to be made by the grantor and his heirs to the grantee, his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."[1] Similar statutes have been enacted in Alabama, Arkansas, California, Delaware, Illinois, Mississippi and Pennsylvania.

[1] Rev. Stat. 1879, Vol. I, § 675. Under this statute the words "bargain," "sell," "release," "quitclaim" and "convey," were held to be words of quitclaim and release merely. Gibson v. Chouteau, 39 Mo. 536. So the words "bargain," "sell" and quitclaim." Valle v. Clemens, 18 Mo. 486. The statutory covenant for further assurance embraces such incumbrances only as the vendor has control of, and not an outstanding mortgage created by the grantor. Armstrong v. Darby, 26 Mo. 517. These statutory covenants are covenants against incumbrances caused by taxes assessed to the owner of the land at the time of sale. Blossom v. Van Court, 34 Mo. 390. The only covenant implied in the words "grant, bargain and sell," which runs with the land is that for further assurance. The word assigns, as used in the statute, is limited to that covenant. Collier v. Gamble, 10 Mo. 467. But in Alexander v. Schreiber 13 Mo. 271, where A. conveyed to B. by deed, containing the words "grant, bargain and sell," certain premises which were at the time subject to a mortgage, and B. conveyed the premises to C., it was held that C. thereby acquired all the right of B. in the covenants contained in A.'s deed, together with a right to sue upon them in his name, and that he was not affected by any verbal understanding between A. and B., as to the incumbrance, unless the fact of its existence was brought to his knowledge at the time of purchase. The covenant of seizin contained in the words "grant, bargain and sell" will not estop the heirs of the grantor from asserting a title not derived from him. They are only liable in damages to the extent of the assets that have descended upon them. Chauvin v. Wagner, 18 Mo. 531. The words "or any person claiming under him," refers to those holding subordinately, and not adversely, to the grantor, notwithstanding such adverse title may have been acquired through or from the grantor. Clore v. Graham, 64 Mo. 249. The possession of a vendee of land need not be under a deed, in order that it may be adverse to his vendor. Ridgeway v. Holliday, 59 Mo. 444. The existence of a paramount title, whether asserted or not, is a breach of the covenant of seizin specifically expressed in the deed, as well as that contained in the words "grant, bargain and sell." Cockrell v. Proctor, 65 Mo. 41.

The ruling of the courts of the different States, as to the extent of the covenants implied from these words, does not seem to be uniform. In Pennsylvania, the court held it to be a covenant that the grantor had done no act, and created no incumbrance, whereby the estate granted by him might be defeated.[1] And the same doctrine is held in Alabama and Arkansas.[2] But, in Mississippi, the words "grant, bargain and sell" are held to import covenants of general warranty of title and against incumbrances and for quiet enjoyment.[3] In Illinois, it is held that the covenants implied by those words extend only to incumbrances done or suffered by the grantor;[4] but that after-acquired title would inure to the benefit of a grantee to the same extent as by a full covenant of warranty.[5] Words which disclose an intention to guarantee or assure a certain quantity of land in the granted premises may imply a covenant that the premises contain the quantity mentioned. The question in such cases usually is, whether the reference to quantity is a part of the description of the premises, or whether it is intended as an assurance of the quantity named. In the first instance no covenant is implied.[6] But if the quantity be of the essence of the agreement between the parties, it is construed as a covenant to the purchaser of the existence of that quantity.[7]

So, where land is conveyed as bounded on one side by a way, it may imply a covenant that there is such a way.[8]

Although a deed contains express covenants, yet other

[1] Knepper v. Kurtz, 58 Pa. St. 480.

[2] Roebuck v. Dupuy, 2 Ala. 538; Winston v. Vaughn, 22 Ark. 72.

[3] Bush v. Cooper, 26 Miss. 599.

[4] Prettyman v. Wilkey, 19 Ill. 235; Hawk v. McCullough, 21 Ill. 220.

[5] D'Wolf v. Hayden, 24 Ill. 525; King v. Gilson, 32 Ill. 353.

[6] Wright v. Wright, 34 Ala. 194; Hall v. Mayhew, 15 Md. 551; Powell v. Clark, 5 Mass. 355; Perkins v. Webster, 2 N. H. 287.

[7] Beall v. Berkhalter, 26 Ga. 564, 567. See Noble v. Googins, 99 Mass. 231.

[8] Parker v. Smith, 17 Mass. 413. See Clap v. McNeil, 4 Mass. 589; Livingston v. Mayor, etc., 8 Wend. 85; Emerson v. Wiley, 10 Pick. 310; Case v. Mercer Street, 4 Cow. (N. Y.) 542.

covenants may be implied. But the latter can operate only when they are consistent with the former.[1] And a general covenant will sometimes be limited or restricted by a special covenant. In Missouri, where a deed containing the statutory words, recited a mortgage existing at the time on the property conveyed, and containing a special covenant that the grantor "will warrant and defend the premises against all persons lawfully claiming the same, and against all titles, liens and incumbrances whatever, and particularly against the mortgage," it was held, that the general covenant implied by the words "grant, bargain and sell" was restrained by the special covenant.[2]

§ 174. **Dependent and Independent Covenants.**— Where the performance of one covenant depends upon the performance of another, the precedent condition must be performed, before an action can be maintained on the other covenant. Covenants are to be regarded as dependent, according to the intention of the parties and the good sense of the case; and technical words will give way to such intention.[3] Courts will not hold covenants to be independent, so

[1] Roebuck v. Dupuy, 2 Ala. 535; Blair v. Hardin, 1 A. K. Marsh. (Ky.) 232; Morris v. Harris, 9 Gill (Md.), 19; Gates v. Caldwell, 7 Mass. 68; Sumner v. Williams, 8 *Id.* 201; Vanderkarr v. Vanderkarr, 11 Johns. 122; Kent v. Welch, 7 *Id.* 258; Crouch v. Fowle, 9 N. H. 219; Maeder v. Carondelet, 26 Mo. 112. The covenants arising from the words "grant, bargain and sell," in a deed, are not inconsistent with, or restrained by, an express covenant of special warranty. Funk v. Voneida, 11 Serg. & R. (Pa.) 109; Seitzinger v. Weaver, 1 Rawle (Pa.), 377.

[2] Shelton v. Pease, 10 Mo. 473.

[3] McCrelish v. Churchman, 4 Rawle (Pa.), 26; Tileston v. Newell, 13 Mass. 410; Tompkins v. Elliott, 5 Wend. (N. Y.) 496; Barruso v. Madan, 2 Johns. 145; Dwiggins v. Shaw, 6 Ired. (N. C.) L. 46; Wright v. Smyth, 4 Watts & S. (Pa.) 527; Adams v. Williams, 2 *Id.* 227; Brockenbrough v. Ward, 4 Rand. (Va.) 352; Johnson v. Reed, 9 Mass. 78; Gardiner v. Corson, 15 Mass. 500; Howland v. Leach, 11 Pick. (Mass.) 154; Bean v. Atwater, 4 Conn. 3; Todd v. Summers, 2 Gratt. (Va.) 167. Whether a covenant is dependent or independent, is to be determined according to the fair intention of the parties, to be collected from the language employed by them. But an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. Bangs v. Lowber, 2 Cliff. 157. And see Robinson v. Harboun, 42 Miss. 795.

that one party may refuse and yet enforce performance, unless there is no other way of construing it.[1] But where one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants to do those acts are independent.[2] Where the covenants are mutual and independent, either party may recover damages from the other for an injury which he may have sustained by the non-performance,[3] without proving a compliance with every stipulation on his part.[4]

§ 175. **The Measure of Damages Recoverable for a Breach of the Covenant of Seizin** is, with few exceptions, the purchase-money and interest.[5] The amount actually paid may be ascertained by evidence, and may be shown to be more or less than the sum mentioned in the deed.[6] So, the value of a thing given as the consideration may be proved.[7] If this cannot be shown, the rule of damages will be the

[1] Mecum v. Peoria, etc. R. R. Co. 21 Ill. 533. Covenants will be construed to be dependent unless a contrary intention clearly appears. Peques v. Mosby, 15 Miss. (7 Smed. & M.) 340; Liddell v. Sims, 17 *Id.* 596; Clopton v. Bolton, 23 Miss. 78.

[2] Tileston v. Newell, 13 Mass. 406; Couch v. Ingersoll, 2 Pick. (Mass.) 300; Goodwin v. Holbrook, 4 Wend. (N. Y.) 377; Cunningham v. Morrell, 10 Johns. 203; Craddock v. Aldridge, 2 Bibb (Ky.), 15; Mullins v. Cabiness, Minor (Ala.), 21; McRaven v. Crisler, 53 Miss. 542.

[3] Cook v. Johnson, 3 Mo. 239.

[4] Morrison v. Galloway, 2 Har. & J. (Md.) 467; Benson v. Hobbs, 4 Har. & J. (Md.) 285; Payne v. Bettisworth, 2 A. K. Marsh. (Ky.) 429; Bean v. Atwater, 4 Conn. 3; Gibson v. Gibson, 15 Mass. 112; Goodwin v. Holbrook, 4 Wend. 377; Manning v. Brown, 10 Me. 49; Obermeyer v. Nichols, 6 Binn. (Pa.) 164. A covenant to pay a certain sum of money, one-half on a certain day, and the other on a certain subsequent day, at which time the covenantee was to execute and deliver a deed, so far as respects the first payment, is independent, but, as to the other, is dependent; and in an action thereon the tender of a deed must be averred. Biddle v. Coryell, 18 N. J. L. 377.

[5] Martin v. Long, 3 Mo. 391; Phipps v. Tarpley, 31 Miss. 433; Nutting v. Herbert, 35 N. H. 120; Blake v. Burnham, 29 Vt. 437; Nichols v. Walter, 8 Mass. 243; Conrad v. Druids Grand Grove, 64 Wis. 258.

[6] Guinotte v. Chouteau, 34 Mo. 154; Lawton v. Buckingham, 15 Iowa, 22; Harlow v. Thomas, 15 Pick. 70; *Ante*, § 79.

[7] Lacey v. Marnan, 37 Ind. 168; Dale v. Shively, 8 Kan. 276. And see Farmer's Bank v. Glenn, 68 N. C. 35; Hodges v. Thayer, 110 Mass. 286; Byrnes v. Rich, 5 Gray (Mass.), 518; Burke v. Beveridge, 15 Minn. 205.

value of the land at the time of the intended conveyance, with interest from the date of the deed.[1] If the breach only extends to a part of the premises, damages will be allowed *pro rata*.[2] The measure of damages never exceeds the amount paid with interest: and many circumstances may operate to reduce that amount. Thus, where the paramount title has never been asserted, and from lapse of time the title has become complete, or an after-acquired title by the grantor inures under the covenant of warranty to the grantee, the damages may be merely nominal,[3] So profits may sometimes constitute an offset;[4] and, if the purchaser has himself extinguished the paramount title, the measure is the amount paid for the outstanding title, not exceeding the price originally paid.[5]

§ 176. **The Damages Recoverable for a Breach of the Covenant Against Incumbrances** are the actual damages sustained, not exceeding the amount of the purchase-money and interest. If the incumbrance be of a permanent character, as a right of way, or other easement, and cannot be removed, the damages will be measured by the diminished value of the estate, occasioned by the existence of such permanent incumbrance.[6] If the incumbrance be of a character

[1] Smith v. Strong, 14 Pick. 128.

[2] Hubbard v. Norton, 10 Conn. 422; Partridge v. Hatch, 18 N. H. 494; Morrison v. McArthur, 43 Me. 567.

[3] King v. Gilson, 32 Ill. 356. A grantee, who has abandoned possession of the premises before hostile assertion of paramount title, can recover only nominal damages. Cockrell v. Proctor, 65 Mo. 41.

[4] Whiting v. Dewey, 15 Pick. 428.

[5] Hall v. Bray, 51 Mo. 288. It devolves upon the covenantee who has purchased an adverse title, without suffering an eviction, to prove that the title purchased is a good title, and it was purchased at a fair and reasonable price. See Lawless v. Collier, 19 Mo. 480; Dickson v. Desire, 23 Mo. 157; Abbott v. Allen, 14 Johns. 247: Sedgw. Meas. Dam. 181. And see McKee v. Bain, 11 Kan. 569.

[6] Harlow v. Thomas, 15 Pick. 66; Williamson v. Hall, 62 Mo. 405. And see Sturtevant v. Phelps, 16 Gray, 50. When a covenant is of such a nature that there can be but one breach and one recovery, the jury are not limited in assessing damages, in an action on the breach, to the time when the suit was instituted, but may award damages for such permanent injury as they may find the plaintiff has sustained. Jacobs v. Davis,

which admits of being removed, and the purchaser shall have extinguished it, he may recover what he may have fairly and reasonably paid for its extinguishment.[1] But until he has paid off the incumbrance, he is only entitled to nominal damages.[2] The purchaser is not bound to redeem, and if the incumbrance, by a failure to redeem, grows into an absolute estate, and the purchaser thereby loses his title altogether, he may recover in damages the purchase-money and interest.[3]

§ 177. **Damages Recoverable for Breach of the Covenant of Warranty.**—The rule as to the measure of damages, recoverable for an eviction, in an action for breach of the covenant of warranty or quiet enjoyment, is not uniform in all the States. In Maine, Vermont, Massachusetts and Con-

34 Md. 204. Evidence of the enhanced value of the land by reason of the railroad, or of privileges accorded by the railroad, is inadmissible. Kellogg v. Malin, 62 Mo. 429.

[1] Reed v. Pierce, 36 Me. 455; Wilson v. Wilson, 25 N. H. 229; Comings v. Little, 24 Pick. 266. A grantee can recover the reasonable expenses paid by him in removing incumbrance—being an assessment for the cost of constructing sewer—although the assessment is in fact invalid, provided it can be re-assessed. Coburn v. Litchfield, 132 Mass. 449. A grantee after bringing suit for a breach of the covenant against incumbrances may pay them off and recover the amount as damages. Johnson v. Collins, 116 Mass. 392. But the proposition that the plaintiff is entitled to recover the amount which he has thus paid, must, it seems, be taken with the qualification that this amount must not exceed the consideration money and interest, in those States in which, on the covenants for quiet enjoyment and of warranty, the limit of damages is the same as on the covenant of seizin. Rawle on Cov., 4th ed., 295. And see Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Foote v. Burnett, 10 Ohio, 334; Greene v. Tallman, 20 N. Y. 191; Cox v. Henry, 32 Pa. St. 21; Brady v. Spurck, 27 Ill. 482; City of St. Louis v. Bissell, 46 Mo. 157; Walker v. Deaver, 79 Mo. 664.

[2] Morrison v. Underwood, 20 N. H. 369; Funk v. Creswell, 5 Iowa, 62; Jenkins v. Hopkins, 8 Pick. 346; Smith v. McCampbell, 1 Blackf. (Ind.) 100; Anderson v Knox, 20 Ala. 156; Eaton v. Lyman, 30 Wis. 41. The right of a divorced wife to have dower assigned in the real estate of him from whom she has been divorced is an incumbrance: but before assignment, although after demand, nominal damages only are recoverable in an action for breach of the covenant. Runnels v. Webber, 59 Me. 488.

[3] Chapel v. Bull, 17 Mass. 213.

necticut, the measure of damages is the value of the land at the time of the eviction.[1] In a majority of the States, however, the measure is the consideration money, interest thereon, and cost, if any, of defending the eviction.[2] And this has been held to include a reasonable attorney's fee.[3] If the eviction extends only to a part of the premises, the measure of damages will be the extent of the injury sustained.[4]

[1] Sterling v. Peet, 14 Conn. 245; Swett v. Patrick, 12 Me. 1; Hardy v. Nelson, 27 Me. 525; Gore v. Brazier, 3 Mass. 523; Caswell v. Wendell, 4 Mass. 108; Norton v. Babcock, 2 Mete. 518; Park v. Bates, 12 Vt. 381. It was formerly so held in South Carolina. Liber v. Parsons, 1 Bay, 19. But it is now held according to the English common law rule, that the measure of damages is the consideration money without interest. Henning v. Withers, 2 Treadw. Const. 584; Ware v. Weathnall, 2 McCord, 413.

[2] Stout v. Jackson, 2 Rand. (Va.) 132; Stewart v. Drake, 4 Halst. (N. J.) 139; Bennett v. Jenkins, 13 Johns. 50; Foster v. Thompson, 41 N. H. 373; Phillips v. Reichert, 17 Ind. 120; Logan v. Moulder, 1 Ark. 313; Davis v. Smith, 5 Ga. 274; Wallace v. Talbott, 1 McCord (S. C.) 466; Grist v. Hodges, 3 Dev. (N. C.) L. 198; Phipps v. Tarpley, 31 Miss. 433; Coffman v. Huck, 19 Mo. 435; McClure v. Gamble, 27 Pa. St. 288; Crisfield v. Storr, 36 Md. 129; Hopkins v. Lee, 6 Wheat. 118; Tong v. Matthews, 23 Md. 437; Swafford v. Whipple, 3 Greene (Iowa), 261; Durbin v. Garrard, 5 B. Mon. (Ky.) 317; Taylor v. Holter, 1 Montana, 688; Dalton v. Bowker, 8 Nev. 198; McGary v. Hastings, 39 Cal. 360; Kingsbury v. Milner, 69 Ala. 502; Stebbins v. Wolf, 33 Kan. 765. But this is subject to exceptions where the breach of covenant is actually wrongful. In such cases substantial damages may be recovered. Mack v. Patchin, 42 N. Y. 167. And nominal damages can be recovered without alleging an eviction or its equivalent. Mason v. Cooksey, 51 Ind. 519. But plaintiff cannot recover more than the paramount title, cost with interest. Snell v. Iowa Homestead Co., 59 Iowa, 701. And the amount must not exceed the orignal price paid defendant. Price v. Deal, 90 N. C. 290.

[3] Staats v. Ten Eyck, 3 Caines, 111; Taylor v. Holter, 1 Montana, 688; Rowe v. Heath, 23 Tex. 614; Lane v. Fury, 31 Ohio St. 574. In Massachusetts this item is not allowed. Leffingwell v. Elliott, 10 Pick. 204. In Maryland, it has recently been held that the assignee of a covenantee cannot recover counsel fees, paid by him in voluntarily defending an ejectment suit, as part of his damages in an action of covenant of title against the covenantor. It is only when the covenantor refuses, after notice given, to defend the title, that the covenantee has the right to employ counsel for that purpose, and to recover such reasonable fees as he has been compelled to pay. Crisfield v. Storr, 36 Md. 129. So, also, it seems, in Pennsylvania. Terry v. Drabenstadt, 68 Pa. St. 400.

[4] *Ante*, § 170; Guthrie v. Pugsley, 12 Johns. 126; Dimmick v. Lockwood, 10 Wend. 142; Boyle v. Edwards, 114 Mass. 373.

ARTICLE XIII.

THE TESTIMONIUM CLAUSE.

SECTION.

180. It should appear that the instrument was intended to be sealed.
181. Relinquishment of dower and homestead.
182. As to the relinquishment of dower.
183. Of the alienation of the homestead.

§ 180. **It Should Appear that the Instrument was Intended to be Sealed** —It is usual to close a deed with a testimonium clause, indicating an intention to execute a sealed instrument; as, "In witness whereof the parties have hereunto set their hands and affixed their seals," etc. In most of the States the statutes, authorizing the use of scroll seals, provide that "every instrument, to which the maker affixes a scroll by way of a seal, shall be of the same force and obligation as if it were actually sealed, provided the maker shall in the instrument recognize such scroll as having been affixed by way of a seal."[1] Under this statute, in order that a scroll may have the effect of a seal, the instrument must show that it was so intended.[2] In Tennessee, the word "seal" affixed to the name was held to be sufficient.[3] But in Indiana an instrument, concluding "witness our hands," with a scroll annexed to the signature, and the word "seal" written therein, was held to be only a simple contract.[4] Under the Alabama statute, an instrument which in the

[1] Stimson's Amer. Stat. §§ 1564, 1565.

[2] Cromwell v. Tate, 7 Leigh (Va.), 301; Lee v. Adkins, Minor (Ala.), 187; Boynton v. Reynolds, 3 Mo. 79; Long v. Long, 1 Morris (Iowa), 43; Grimsly v. Riley, 5 Mo. 280; Walker v. Keile, 8 Mo. 301; Glasscock v. Glasscock, 8 Mo. 577; Armstrong v. Pearce, 5 Harr. (Del.) 351; Bell v. Keefe, 13 La. Ann. 524; Hudson v. Poindexter, 42 Miss. 301; Norvell v. Walker, 9 W. Va. 447; Haseltine v. Donahue, 42 Wis. 576.

[3] Whitley v. Davis, 1 Swan, 333. And see Whittington v. Clacke, 16 Miss. (8 Smed. & M.) 480.

[4] Deming v. Bullett, 1 Blackf. 241. And see Jenkins v. Hurt, 2 Rand. 446. But *contra*, Lewis v. Overby, 28 Gratt. 627.

body of it purports to be under seal, will be considered a deed, though no seal or scroll be annexed to the signature.[1] Unless made so by statute, a scroll of ink or other devise does not constitute a seal, even though it appear that it was so intended.[2]

§ 181. **Relinquishment of Dower and Homestead.**—It is the practice, in many of the States, for the wife to bar her right of dower or of homestead, or both, by a clause of release; as, "in token of her relinquishment of dower and homestead in the granted premises," etc, which is properly a part of the testimonium clause,[3] and may, therefore, be considered under this head. It is not our purpose, however, to enter into a discussion of the nature of the rights or interests embraced under this head. It will be sufficient to remark that neither the right of dower, nor homestead, is such an interest in land as can be alienated separate from the fee.[4] A release of the claim operates merely as an estoppel: it conveys no interest in land.[5] In several of the States, the custom is for the release of dower and homestead to appear in the certificate of acknowledgment only; and in some of the States it has been expressly decided, that it is not necessary that such a recitation should appear in the

[1] Shelton v. Armor, 13 Ala. 647. See Starkweather v. Martin, 28 Mich. 471; Hudson v. Poindexter, 42 Miss. 304; Mitchell v. Parham, Harp. (S. C.) 1.

[2] Perrine v. Cheeseman, 11 N. J. L. 174; Warren v. Lynch, 5 Johns. 239.

[3] Frost v. Deering, 21 Me. 156; Davis v. Bartholomew, 3 Ind. 485; Fowler v. Shearer, 7 Mass. 14; Stinson v. Sumner, 9 Mass. 143; Stearns v. Swift, 8 Pick. 532; Witter v. Biscoe, 13 Ark. 422; Burge v. Smith, 27 N. H. 332; Learned v. Cutler, 18 Pick. 9.

[4] As to homestead. McDonald v. Crandall, 43 Ill. 232; Hewitt v. Templeton, 48 Ill. 367; Chamberlain v. Lyell, 3 Mich. 458; Barker v. Rollins, 30 Iowa, 412. A release of dower to a stranger cannot be set up as a bar to her claim against the tenant of the estate, although the release was made to one through whom the tenant claims. Pixley v. Bennett, 11 Mass. 290; Harriman v. Gray, 49 Me. 538.

[5] Green v. Putnam, 1 Barb. 500; Moore v. New York, 4 Seld. 110; Mallory v. Horan, 12 Abb. Pr. (N. S.) 289.

body of the deed.[1] But in other States it has been held that such a release must appear both in the body of the deed and in the certificate of acknowledgment.[2] It would seem to be eminently proper, where a wife joins in the deed, to insert some such a clause in the body of the deed, if for no other reason than to show the respective interests intended to be conveyed. In those States in particular, in which the manner of releasing the homestead right has not been settled, either by statute or adjudication, it would doubtless be wise to adopt this precaution in drawing a conveyance or mortgage of the homestead.

§ 182. **As to the Relinquishment of Dower.**—At common law no conveyance by the husband alone, without the assent of his wife, given and proved according to law, could defeat her right of dower;[3] and she could only release her claim by joining with her husband in the act. In England, prior to the statute of 3 and 4, Wm. IV. ch. 74, the only regular way of doing this, after the right had once attached,[4] was by means of a fine, in which the wife was separately examined.[5] By that statute fines and recoveries were abol-

[1] As to homestead, see Babcock v. Hoey, 11 Iowa, 375; O'Brien v. Young, 15 Iowa, 5; Robbins v. Cookendorfer, 10 Bush, 629. But if it appears either in the deed or certificate of acknowledgment that the wife only released her dower, it will not be a waiver of the homestead. Wing v. Hayden, 10 Bush, 280.

[2] As to homestead, see Witter v. Biscoe, 13 Ark. 422; Russell v. Rumsey, 35 Ill. 362; Connor v. McMurray, 2 Allen, 202. And see Hoge v. Hollister, 2 Tenn. Ch. 606. As to dower, see Leavitt v. Lamprey, 13 Pick. 383; Catlin v. Ware, 9 Mass. 218; Stevens v. Owens, 25 Me. 94; Powell v. Monson, etc. Co., 3 Mason, 349; Hall v. Savage, 4 Mason, 273; Lufkin v. Curtis, 13 Mass. 223. See Lothrop v. Foster, 51 Me. 367; Westfall v. Lee, 7 Iowa, 12.

[3] Rank v. Hanna, 6 Ind. 20.

[4] In order to prevent this inconvenient right from attaching on newly purchased lands, and to enable the purchaser to make a title at a future time, without his wife's concurrence, various devices were resorted to in framing of purchase deeds, for an account of which see Williams on Real Prop. 215, *et seq.*; 4 Kent's Com. 51, 52.

[5] Williams on Real Prop. 214; 4 Kent's Com. 51. Fines and recoveries were never in use in the United States, except to a very limited extent. *Ante*, § 58.

ished, and wives may now convey their estates by deeds executed in concurrence with their husbands; but the separate examination, which was before necessary in the case of a fine, is still retained.[1] This mode of passing the estate of a married woman, whether in her own property or that of her husband, has prevailed in this country from a very early period.[2] In some of the States the separate examination and acknowledgment of the wife is required,[3] and is others it is not; but, with few exceptions, the husband must join with the wife in the deed by which she relinquishes her right, in order to give it any effect as a bar of dower.[4] In a few of the States special powers have been conferred by statute upon married women in respect to the execution of deeds, by which the common law rules have been abrogated.[5] The law as to the right of the husband to defeat the widow's right of dower by his own deed has also been essentially changed in several of the States, as well as in England, so that she is only dowable of such land as he

[1] Williams on Real Prop. 213.

[2] Davey v. Turner, 1 Dallas, 15; Lloyd's Lessees v. Taylor, *Id.* 17; Fowler v. Shearer, 7 Mass. 20; Powell v. Monson, etc. Co., 3 Mason, 347; Burge v. Smith, 7 Fost. (N. H.) 332; Jackson v. Gilchrist, 15 Johns. 109.

[3] Stimson's Amer. Stat., § 6501.

[4] Powell v. Monson, etc. Co., 3 Mason, 353, 354; Stearns v. Swift, 8 Pick. 532; Page v. Page, 6 Cush. 196; Elmendorf v. Lockwood, 57 N. Y. 322; Ulp v. Campbell, 19 Pa. St. 361; Davis v. Bartholomew, 3 Ind. 485; Williams v. Robson, 6 Ohio St. 514; Moore v. Tisdale, 5 B. Mon. 353; Shaw v. Russ, 14 Me. 432. A separate release written on the back of the husband's deed held insufficient to bar dower. French v. Peters, 33 Me. 396. In Mississippi, dower may be released first by a joinder of the wife in a conveyance by the husband, acknowledged by her on a private examination apart from him, or a separate deed of relinquishment: second, by a conveyance of the husband in good faith for a valuable consideration. Sykes v. Sykes, 49 Miss. 190.

[5] Stimson's Amer. Stat., §§ 3245, 6504. By statute, in Massachusetts, the wife may release her dower to the owner of the fee by a separate deed. Gen. Stat. ch. 90, § 8. And in New Hampshire it has been held that she may bar her dower by a separate deed subsequent to that of her husband. Shepherd v. Howard, 2 N. H. 507. And see Chicago Dock Co. v. Kinzie, 49 Ill. 289. Married woman by joining with her husband in the deed releases dower. Dutton v. Stuart, 41 Ark. 101; Prite v. Kneale, 109 Ill. 652.

dies seized of.[1] The question as to the effect of a deed, made for the purpose of defeating a wife's dower in such case, has been differently decided in different States.[2] In some of the States such a deed has been held fraudulent and void,[3] while in others it would be effectual.[4]

It may be observed that, where a transaction vests a mere instantaneous seizin in the husband, without the intent to clothe him with a beneficial interest, it gives the wife no right of dower in the land.[5] So, where the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor,[6] or to a third person,[7] to secure the purchase-money, in whole or in part, the wife's right of dower is subject to the mortgage.[8]

We have seen in a prior section that, in some of the States, a deed is insufficient to convey the wife's right of

[1] As to provisions of statute governing questions of rights of dower, and in what lands widow can claim dower, see Stimson's Amer. Stat., § 3202.

[2] Stimson's Amer. Stat. § 3203.

[3] McGee v. McGee, 4 Ired. 105; Brewer v. Connell, 11 Humph. 500. See Rowland v. Rowland, 2 Sneed, 543; Sykes v. Sykes, 49 Miss. 190.

[4] Jenny v. Jenny, 24 Vt. 324.

[5] Co. Litt. 31, *b.*; 4 Kent's Com. 39; 2 Crabb Real Prop. 161; Stanwood v. Dunning, 14 Me. 290. Whether the seizin is sufficient to confer the right of dower, depends upon the character rather than the duration of the seizin. Maybury v. Brien, 15 Pet. 39; McCauley v. Grimes, 2 Gill & J. 318; Webster v Campbell, 1 Allen, 314; Pendleton v. Pomeroy, 4 Allen, 510. The question is whether the two instruments are to be considered as part of one and the same transaction, no space of time intervening between the taking and parting with the estate. King v. Stetson, 11 Allen, 408; Lassen v. Vance, 8 Cal. 274; Stow v. Tifft, 15 Johns. 462; Boynton v. Sawyer, 35 Ala. 497; Stephens v. Sherrod, 6 Tex. 297. But see McClure v. Harris, 12 B. Mon. 261.

[6] Stow v. Tifft, 15 Johns. 458; Bullard v. Bowers, 10 N. H. 500; Griggs v. Smith, 7 Halst. 22; Hinds v. Ballou, 44 N. H. 620; Holbrook v. Finney, 4 Mass. 566; Reed v. Morrison, 12 Serg. & R. 18; Eslava v. Lepretre, 21 Ala. 504. But see McClure v. Harris, 12 B. Mon. 261.

[7] Clarke v. Monroe, 14 Mass. 351; Maybury v. Brien, 15 Pet. 39; Smith v. Stanley, 37 Me. 11; Gilliam v. Moore, 4 Leigh, 30; Kittle v. Van Dyck, 1 Sand. Ch. 76; Cunningham v. Knight, 1 Barb. 399. But see Mills v. Van Voorhis, 23 Barb. 135; Gammon v. Freeman, 31 Me. 243.

[8] 4 Kent's Com. 39; 1 Washb. on Real Prop., 4th ed., 219. As to dower in lands mortgaged, see Stimson's Amer. Stat. §§ 3213, 3214.

dower, although signed by her with her husband, unless it contains words of grant or release, which specially apply to her interest in the estate.[1] But it has been held sufficient to bar dower, if the deed contains words of grant which she adopts, although no reference is made *eo nomine* to her right of dower.[2] And by custom in New Hampshire, a wife may bar her right of dower, by signing and sealing her husband's deed of his land.[3] In all these cases, however, the deed must be acknowledged in the mode pointed out by the statute of the particular State, and properly certified in order to operate as a bar.[4]

§ 183. **Of the Alienation of the Homestead.**—In most of the States the constitution or the statutes, creating the right of homestead, provide against the alienation of land dedicated as a homestead, except by the joint deed of the husband and wife.[5] And in many of the States the wife's acknowledgment must be made separate and apart from

[1] *Supra*, § 181.

[2] Learned v. Cutler, 18 Pick. 9; Smith v. Handy, 16 Ohio, 236.

[3] Burge v. Smith, 27 N. H. 332; Dustin v. Steele, *Id.* 131. Acknowledging a deed not executed by her, will not bar the wife's claim of dower. Witter v. Biscoe, 13 Ark. 422. Where by the terms of the deed the husband alone conveyed, it was held no bar to the wife's dower, although she was described in the deed as a party, and joined in the execution and in acknowledging it. McFarland v. Febiger, 7 Ohio, 194. And it seems that in Iowa where grantor's wife did not join in the deed, but in consideration of payment of the purchase-money to her, promised orally never to claim dower, that her promise bound her and her heirs. Dunlap v. Thomas, 69 Iowa, 358.

[4] Rogers v. Woody, 23 Mo. 548; Clark v. Redman, 1 Blackf. 379; Kirk v. Dean, 2 Binn. 341; Lewis v. Coxe, 5 Harring. 402; Scanlan v. Turner, 1 Bailey, 421. See Morris v. Sargent, 18 Iowa, 99; *Infra*, Chap. 4, Art. 1. But see 1 Am. Jur. 71.

[5] California Civil Code, § 1242; Georgia Code, 1873, § 2025; Illinois Rev. Stats., 1877, ch. 52, § 4; Indiana Rev. Stats., 1876, p. 354, ch. 11, § 3; Iowa Code, 1873, § 1990; Dakota Rev. Code, 1873, ch. 38, § 3; Wisconsin Rev. Stats., 1878, § 2203; Tennessee Stats., 1871, Vol. 1, § 2114, a; Texas Const., 1869, Art. 12, § 15; Kansas Const., Art. 15, § 9; Vermont Gen. Stats., 1863, p. 457, § 10; Mich. Const., ch. 16, § 2; North Carolina Const., ch. 10, § 8. Conveyance of homestead by the husband to the wife is not within the statute. Harsh v. Griffin (Iowa), 34 N. W. Rep. 441.

her husband, as in case of a release of dower.[1] In Colorado the instrument must be *signed* as well as acknowledged, separate and apart from the husband.[2] It seems that in Kentucky, although the husband cannot "mortgage, release or waive" the homestead exemption to a creditor "except by a conveyance in which his wife joins, and which is acknowledged and recorded in the same manner as conveyances of real estate,"[3] yet this does not impose any restraint upon the general right of alienation vested in the owner of real estate by the laws of the State.[4] And in several of the States where the wife's concurrence in every form of alienation is necessary, it is not so in the case of a mortgage by the owner to secure the payment of the purchase-money of the homestead.[5] In Ne-

[1] Lambert v. Kinney, 74 N. C. 348. In Alabama and Arizona the homestead statutes provide that the certificate of some officer, authorized by law to take acknowledgments of deeds, must be attached to the instrument of alienation, to the effect that the wife of the alienor, being fully apprised of her rights, was examined by him separate and apart from her husband, and acknowledged that her signature to the instrument was voluntary. Ala. Code, 1876, § 2822; Gates v. Hester (Ala.), 1 South. Rep. 848; Scott v. Simons, 70 Ala. 352. But not required when the homestead is her property. Dawson v. Burnes, 73 Ala. 111. And see Hood v. Powell, *Ibid.* 171; Moses v. McClain (Ala.), 2 South. Rep. 741; Riecke v. Westenhoff, 85 Mo. 642; Comp. Laws of Arizona, 1871, ch. 37, § 2. In Vermont the statute provides that, unless the wife joins in the execution and acknowledges such conveyance, as in the conveyance of lands of a married woman, the same "shall be wholly inoperative." Gen. Stats., 1863, p. 457, § 10. But see Lawver v. Slingerland, 11 Minn. 447. In Illinois it is held that it must appear in the certificate of acknowledgment, as well as in the body of the deed, that she relinquishes that particular right. Boyd v. Cudderback, 31 Ill. 113. The privy examination, acknowledgment and declaration before the officer, as required by statute, is the essence and foundation of her deed. Cross v. Everts, 28 Texas, 532.

[2] Gen. Laws, 1877, ch. 46, § 6.

[3] Gen. Stats., 1873, ch. 38, Art. 13, § 9. A homestead exemption is not waived by the wife merely joining with her husband in a mortgage of his property "to relinquish her right of dower." Herbert v. Kenton Assoc., 11 Bush, 296.

[4] Brame v. Craig, 12 Bush, 404. But see McGrath v. Berry, 13 Bush, 391.

[5] Minn., 1 Biss. Stat. at Large, 630, title 5, § 166; Mich. Comp. Laws,

vada the statute provision is that no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead, shall be valid for any purpose whatever, *provided*, that the mortgage or alienation to secure or pay the purchase-money shall be valid, if the signature of the wife be obtained to the same and acknowledged by her, separate and apart from her husband.[1] In Texas the provision is, that no mortgage, trust-deed, or other lien on the homestead, shall ever be valid, except for the purchase-money thereof, as hereinbefore provided, whether such mortgage, or trust-deed, or other lien, shall be created by the husband alone, or together with his wife; and all pretended sales, involving any condition of defeasance, shall be void.[2] These examples will serve to illustrate the diversity of the statutes of the several States upon this subject, some of which have been held unconstitutional, as being in restraint of alienation.[3] Generally speaking, power to sell the homestead in a prescribed manner includes the power to *mortgage* it: for "a mortgage is a conditional sale."[4] But a statute which creates a homestead exemption, and prescribes formalities for its alienation, subjects the owner to a disability which no means to which he can resort will enable him to avoid or overcome.[5] "He can part with it only by the formalities prescribed by

1871, ch. 193, § 2; Va. Code, 1873, ch. 183, § 7; N. H. Gen. Stats., 1867, ch. 124, § 2; Vt. Gen. Stats., 1870, ch. 68, § 10.

[1] Comp. Laws, 1873, p. 61, § 187.

[2] Const. Texas, 1876, Art. 16, § 50. And see Newman v. Farquhar, 60 Tex. 640. If the husband seeks to convey the homestead without his wife's joining under fraudulent claim that it is necessary to do so for the unpaid purchase-money, his conveyance passes no title to purchasers with notice. Morris v. Geisecke, 60 Tex. 633.

[3] Dunker v. Chedic, 4 Nev. 378. And see Johnson v. Fay, 16 Gray, 144.

[4] Dunker v. Chedic, 4 Nev. 382; Richard v. Chace, 2 Gray, 385; Boyd v. Cudderback, 31 Ill. 119; Sampson v. Williamson, 6 Texas, 102; Lee v. Kingsbury, 13 Texas, 69; Jordan v. Peak, 38 Texas, 139.

[5] Connor v. McMurray, 2 Allen, 204. Except that he may abandon it and take his family with him. Williams v. Swetland, 10 Iowa, 56; Robinson v. Davenport, 10 Texas, 333, 345.

law."[1] Thus, where the statute provides that, in order to make a valid conveyance of the homestead, the wife of the owner must join in the deed, a conveyance by the husband alone is held by most courts to be *void*, not only as to the wife, but also as to the husband. Such a conveyance therefore estops neither from asserting the homestead right as against the alienee.[2] And separate deeds by husband and wife have been held not to be a sufficient compliance with the provisions of a statute requiring a "deed executed by husband and wife."[3] But a conveyance to secure a debt which is privileged against the homestead will pass the homestead right, though imperfectly executed by the wife,[4] or although the wife does not join in the deed at all, since as to such a debt there is no homestead.[5]

Land will not, as a general rule, be subject to any restric-

[1] Abbott v. Cromartie, 72 N. C. 292; Beaven v. Speed, 74 N. C. 548; Flege v. Garvey, 47 Cal. 371; Thompson on Homesteads, §§ 447, 470.

[2] Ayers v. Probasco, 14 Kan. 190; Revalk v. Kraemer, 8 Cal. 66; Barber v. Babel, 36 Cal. 11; Sears v. Dixon, 33 Cal. 326; Williams v. Starr, 5 Wis. 534, 550; Hait v. Houle, 19 Wis. 472; Rogers v. Renshaw, 37 Texas, 625; Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298; Alley v. Bay, 9 Iowa, 509; Larson v. Reynolds, 13 Iowa, 579; Kennedy v. Stacey, 57 Tenn. 220; Hoge v. Hollister, 2 Tenn. Ch. 606; Richard v. Chace, 2 Gray, 385; Connor v. McMurray, 2 Allen, 202; Doyle v. Coburn, 6 Allen, 72; Abell v. Lothrop, 47 Vt. 375, 380; Flege v. Garvey, 47 Cal. 371; Rogers v. Renshaw, 37 Texas, 625. Under the Kansas Constitution, Art. 15, § 9, which provides that the homestead is not alienable "without the joint consent of husband and wife," a mortgage executed by the wife alone, notwithstanding the legal title may be in her and not in her husband, is void. Dollman v. Harris, 5 Kan. 597. And such a conveyance constitutes no incumbrance within the meaning of the covenant against incumbrances, and if the land is sold, it does not become subject to the mortgage in the hands of the purchaser. Morris v. Ward, 5 Kan. 248. A junior mortgage executed by both husband and wife will prevail over a senior mortgage executed by the husband alone. Alley v. Bay, 9 Iowa, 509; Kent v. Agard, 22 Wis. 150; Dye v. Mann, 10 Mich. 291; Van Reynegan v. Revalk, 8 Cal. 75.

[3] Dickinson v. McLane, 57 N. C. 31. And see Poole v. Gerard, 6 Cal. 71.

[4] Wood v. Lord, 51 N. H. 448; Burnside v. Terry, 51 Ga. 186.

[5] Thomp. on Homest. and Exemp., § 362.

tions as a homestead until it has been dedicated as such, either by a public notice of record, in conformity with the statutes which exist in some of the States, by visible occupancy and used as a homestead, or by the actual setting off of the homestead, by or under the direction of a court of justice. Although the filing of notice as provided by statute, has in some States been held to be a condition precedent of the right to claim the exemption,[1] yet in most of the States visible occupancy is sufficient notice, to creditors and purchasers, of the reservation; and, as a general rule, although the homestead has been dedicated by notice of record or otherwise, occupancy is still necessary to preserve the right. Thus, it seems, if the husband abandons the homestead, and takes his wife with him, he may then sell it without his wife's concurrence, since by the act of abandonment it ceased to be the family homestead.[2] And in some of the States it has been held that the sale of a homestead which is inoperative, because the homestead right has not been released by both husband and wife, may be rendered valid by subsequent abandonment.[3] But the rule seems to be otherwise in Michigan.[4]

[1] Drake v. Root, 2 Col. 685; Simmons v. Anderson, 56 Ga. 53; The People v. Plumstead, 2 Mich. 465; Homestead Assn. v. Enslow, 7 S. C. 19.

[2] Thomp. on Homest. and Exemp., §§ 42, 276, 467, and cases cited.

[3] Hall v. Fullerton, 69 Ill. 448; Vasey v. Trustees, 59 Ill. 188; Brown v. Coon, 36 Ill. 243; Stewart v. Mackey, 16 Texas, 56; Jordan v. Godman, 19 Tex. 273.

[4] Ring v. Burt, 17 Mich. 465, 472.

CHAPTER III.—The Execution of Deeds.

ARTICLE I. Of the Reading Requisite to make a Valid Deed.
II. How far Signing is Necessary.
III. As to the Seals.
IV. Attesting Witnesses.
V. Of the Delivery of a Deed.
VI. Powers of Attorney to Execute Deeds.
VII. Of the Execution of Deeds by Attorney.

ARTICLE I.

OF THE READING REQUISITE TO MAKE A VALID DEED.

SECTION.
186. Reading essential, when.
187. Fraud or mistake in reading vitiates the deed.

§ 186. **Reading** an instrument correctly to one who cannot read, and who requests to have it read, is essential to its execution.[1] And where the grantor is old, decrepit and ignorant, it is the duty of the officer authenticating the execution of the deed, to make known to him its contents, by such means as will enable him to comprehend the nature and effect of his act. A simple formal reading is insuffi-

[1] Suffern v. Butler, 18 N. J. Eq. 220; Shep. Touch. 56; Rex v. Longnor, 1 Nev. & Man. 576; Hallenbeck v. Dewitt, 2 Johns. 404; Rosseter v. Simmons, 6 Serg. &. R. 452.

cient in such a case.[1] So, reading an instrument in English to a person who does not understand the language, would seem to be insufficient.[2] But where the party can read for himself, or, being unable to read, neglects to request to have it read, or its contents made known, he cannot object that he was misled in signing it.[3] Where a grantor, who was deaf and dumb, directed a deed to be drawn, and this was done and presented to him in conformity to such direction, and he desired only to know the extent of lands contained in the deed, and was content to execute it without further explanation, it was held that the deed would be good, provided an explanation was made commensurate with the request of the grantor.[4]

§ 187. **Fraud or Mistake in Reading will Vitiate the Deed.**—If a deed is read to a blind or illiterate person, falsely, with intent to deceive him, it is a fraud, and the deed is void. Or if it be incorrectly read by mistake, although there is no fraud, the deed cannot stand, because the grantor did not intend to execute such a deed as he executed, but such as was read to him.[5] But mistake or ignorance as to the legal effect of an instrument, will not, of course, avoid it. It may be added, that a grantor is always presumed to have known the contents of the deed he has executed, unless the contrary is shown. The burden of proof is on the party attacking the deed.[6]

[1] Lyons v. Van Riper, 26 N. J. Eq. 337. And see Morrison v. Morrison, 27 Gratt. 190.

[2] Fisher v. Meister, 24 Mich. 447.

[3] Wood on Conv., 237; Shep. Touch. 56; School Committee v. Kesler, 67 N. C. 443.

[4] Brown v. Brown, 3 Conn. 303.

[5] Jackson v. Hayner, 12 Johns. 469.

[6] An heir cannot avoid his ancestor's deed by showing that the grantor was old and infirm, that the deed was not read to him at the time of its execution, that no consideration was paid, and that the grantor remained in possession until his decease. Kimball v. Eaton, 8 N. H. 391.

ARTICLE II.

HOW FAR SIGNING IS NECESSARY.

SECTION.

189. Signing formerly unnecessary, but now required.
190. What constitutes a sufficient signature.
191. Deeds by corporations.

§ 189. **Signing Formerly Unnecessary.**—At common law signing, as a part of the execution of a deed, was unnecessary, though always advisable.[1] When the instrument was not signed, it was authenticated by a seal on which was engraved the coat of arms of the individual executing it. Since private seals of this description have grown into disuse, it is presumed that a signature would be deemed essential, at common law. Signing is now required by the Statute of Frauds, and is necessary in most, if not all of the States, in order to give validity to deeds.

§ 190. **As to what will Constitute a Sufficient Signing,** it may be observed, that it is not necessary that the party should write his own name: his mark is sufficient, though he be able to write.[2] It seems now to be settled law, that if the name of the grantor is written at the bottom of the deed by a third person, by the grantor's request, and in his presence, it is a sufficient signature, without any mark.[3] But where the deed is to be made in the grantor's absence, the authority must be given by an instrument executed with the same solemnity as is required in the execution of the

[1] Shep. Touch., Prest. ed. 56, and note: 1 Wood on Conv. 238; Williams on Real Prop., 156.

[2] Baker v. Dening, 8 Adol. & El. 94; Truman v. Lore, 14 Ohio St. 154; Frost v. Deering, 21 Me. 156; Bickley v. Keenan, 60 Ala. 295.

[3] Pierce v. Hakes, 23 Pa. St. 231; The Mutual Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 193; Lovejoy v. Richardson, 68 Me. 386; Coulon v. Grace (Minn.), 30 N. W. Rep. 880. But see Wallace v. McCollough, 1 Rich. Eq. 426; Browne on Stat. Frauds, 12.

deed itself.[1] It has been held, however, that one whose name was subscribed to a deed by his wife in his absence, adopted the signature as his own by acknowledging it.[2] The fact that a grantor signs a deed by the wrong name does not render the conveyance invalid, if he is designated by his true name in the body of the deed, and in the certificate of acknowledgment.[3] Though, when the grantor of a deed signs by a different name from that recited in the instrument, the identity of person should be proved before the deed is admitted in evidence.[4] We have previously observed that a party cannot avoid his deed by reason of his name being misspelled; proof of its execution is sufficient.[5] Where the signature of the owner of property is forged to a deed conveying the property, nothing passes and notice of the forgery is not necessary to make the deed a nullity.[6] It has been held, that where there are two grantors and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other, and once for himself. One signature and a second seal is not equal to a second subscription.[7] The execution of deeds by attorneys in fact will be considered hereafter.[8]

§ 191. **Deeds by Corporations.**—A deed of conveyance by a corporation must, of course, be executed in the corporate name and under the corporate seal.[9] A deed, executed in the name of the president of a corporation purporting to

[1] McMurtry v. Brown, 6 Neb. 368; *infra*, Art. VI.

[2] Bartlett v. Drake, 100 Mass. 174.

[3] Middleton v. Findla, 25 Cal. 76.

[4] Tustin v. Faught, 23 Cal. 237.

[5] O'Meara v. North American, etc. Co., 2 Nev. 112; Houx v. Batteen, 68 Mo. 84; *ante*, § 70.

[6] Cole v. Long, 44 Ga. 579. When the alleged maker of a recorded deed has filed an affidavit as required by Ga. Rev. Code, § 2676, that the deed is a forgery, and an issue is found to try the genuineness of the deed, the burden of proof is on the party asserting the genuineness. Hanks v. Phillips, 39 Ga. 550.

[7] Meagher v. Thompson, 49 Cal. 189.

[8] *Infra*, Articles VI. and VII.

[9] Hatch v. Barr, 1 Ohio, 181.

convey its lands, was held inoperative.[1] Though, where a deed, purporting to be the deed of a corporation, was signed by its trustees, as trustees, and had the corporate seal affixed, it was held admissible in evidence as a deed of the corporation, and that it was itself presumptive evidence of the regular and duly authorized execution thereof.[2] So, a deed in which a corporation is described in the body of it as the grantor, and executed by the vice-president thereof, signing himself as such, and attested by the seal of the corporation, is *prima facie* well executed and is the deed of the corporation.[3]

ARTICLE III.

AS TO THE SEALS.

SECTION.

193. A seal essential to the validity of a deed, at common law.
194. What will constitute a common law seal.
195. A scroll may be used as a seal in what States.
196. Several persons may adopt the same seal.
197. Of corporate seals.

§ 193. **At Common Law a Seal was Indispensably Necessary to the Validity of a Deed.**—And the same is believed to be true in all of our States where the common law has been adopted;[4] excepting those States in which seals have been expressly abolished by statute. No seal was necessary under

[1] Zoller v. Ide, 1 Neb. 439. But see Bason v. King's Mountain Min. Co., 90 N. C. 417.

[2] Miner's Ditch Co. v. Zellerbach, 37 Cal. 543.

[3] Sawyer v. Cox, 63 Ill. 130.

[4] The term "deed" signifies a writing with a seal, and the seal is essential to make the writing a deed. Taylor v. Morton, 5 Dana (Ky.), 365; Davis v. Brandon, 1 How. (Miss.) 154; Jones v. Crawford, 1 McMull. (S. C.) 373. A paper purporting to be a deed of trust, but not under the seals of the grantors, *held*, not to be, within the meaning of the Code, a

the civil law [1] Among the States in which the use of seals has been abolished by statute are Alabama, Iowa, Kansas, Kentucky, Texas, Ohio, Tennessee.[2] In those States in which seals are dispensed with, the conveyance retains all the operation and effect of a sealed deed at common law; and the estoppel, arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.[3]

§ 194. **A Common Law Seal** has frequently been defined to be "an impression on wax, or wafer, or some other tenacious substance capable of being impressed."[4] And according to Lord Coke "it is required that the deed, charter, or writing must be sealed, that is, have some impression on the wax."[5] But it has been held in some of the States that the law does not require that the impression shall be apparent.[6]

contract in writing made for the conveyance or sale of real estate, but only a contract for a lien to be created by a deed of trust. Pratt v. Clemens, 4 W. Va. 443. An instrument in form of a deed, but not sealed, conveys an equitable title. Grandin v. Hermandey, 29 Hun, 399. See Le Franc v. Richmond, 5 Sawyer, 603.

[1] Before 1816, a sealed instrument of writing was not necessary, in Missouri, to convey land. Moss v. Anderson, 7 Mo. 337.

[2] See Stimson's Amer. Stat., § 1564. In Alabama, "all writings which import on their face to be under seal, are to be taken as sealed instruments, and have the same effect, as if the seal of the parties was affixed thereto." Ala. Code, 1876, § 2194; Goodlett v. Hansell, 56 Ala. 346; Pierson v. Armstrong, 1 Iowa, 293; Simpson v. Mundee, 3 Kan. 172; Ky. Gen. Stats. 1879, ch. 22, § 2. Under the Texas act (Rev. Stats. 1879, art. 4487), the use of scrolls or private seals in all cases, except corporations, is dispensed with. Courand v. Vollmer, 31 Tex. 397. And see Bowers v. Chambers, 53 Miss. 259. In Michigan, under statute, § 7778, making deed valid without seal or scroll, the intention of the parties, together with the purpose the instrument was intended to serve, constitute the test of the existence of a deed. Jerome v. Ortman (Mich.), 33 N. W. Rep. 759.

[3] Jones v. Morris, 61 Ala. 518.

[4] Warren v. Lynch, 5 Johns. 239; Beardsley v. Knight, 4 Vt. 471; Bradford v. Randall, 5 Pick. 496; Tasker v. Bartlett, 5 Cush. 359, 364.

[5] 3d Inst. 169.

[6] Pease v. Lawson, 33 Mo. 35; Hughes v. Debnam, 8 Jones (N. C.) L., 127. But in Richard v. Boller, 6 Daly (N. Y.), 460, it was held that a printed seal was not sufficient, the court remarking that it must be "an

And a piece of colored paper attached as a seal, without any impression whatever, has been held sufficient.[1] On the other hand a seal, stamped upon the paper instead of wax or a wafer, has also been held good.[2]

§ 195. **A Scroll may be used where.**—By statute, in many of the States, a scroll annexed to the signature with a pen constitutes a sufficient seal.[3] Among the States in which this is true are Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, Ohio, Oregon, Wisconsin, and South Carolina. In those States, as a general rule, to give a scroll the effect of a seal, the maker must, in the instrument itself, declare that he set his seal thereto.[4] But under the statute of Mississippi it was held, that "a scroll attached to a written instrument has the effect of a seal, whenever it appears, from the body of the instrument, the scroll itself, or the place where affixed, that such scroll was intended as a seal."[5] And the same is held in Florida.[6] In Tennessee, it was held that the word "seal" affixed to the name, is as clearly indicative of an intention to execute a sealed instrument as a seal or scroll, and is sufficient to constitute the instrument a deed.[7] But in other States it

impression upon and made visible in wax or wafer, or like substance attached to the paper, or at least the very substance of the paper."

[1] Turner v. Field, 44 Mo. 382. A piece of paper, affixed to an instrument with mucilage and stamped with a permanent impression, is good as a common law seal. Gillespie v. Brooks, 2 Redf. (N. Y.) 349.

[2] Pillow v. Roberts, 12 Ark. 822; *s. c.*, 13 How. 473; Roberts v. Pillow, 1 Hempst. 624; Pierce v. Indseth, 106 U. S. 546. But see Bank of Rochester v. Gray, 2 Hill (N. Y.), 227; Farmers' Bank v. Haight, 3 *Id.* 493.

[3] See Stimson's Amer. Stat., § 1565. In New York and New Jersey it has been expressly decided that a scroll will not constitute a seal. Warren v. Lynch, 5 Johns. 239; Perrine v. Cheeseman, 11 N. J. L. 174.

[4] Cromwell v. Tate, 7 Leigh, 301; *Ante*, § 180.

[5] Hudson v. Poindexter, 42 Miss. 304; McRaven v. McGuire, 9 Smed. & M. 34.

[6] Comerford v. Cobb, 2 Fla. 418. In Nebraska, where statute requires a seal on tax-deed, a scroll is not sufficient. Hendrix v. Boggs, 15 Neb. 469.

[7] Whitley v. Davis, 1 Swan (Tenn.), 333.

has been held otherwise.[1] In Wisconsin a printed "L. S." inclosed in brackets, in the usual place of a seal, is sufficient.[2] If there be an expression in the body of the instrument, denoting that it is sealed, it will be a sealed instrument, whatever the scroll may be.[3] The word "seal" at the end of the name, referred to in the testimonium clause, is a sufficient sealing.[4] In Alabama, the conclusion of an instrument with "witness my hand and seal" constitutes a sealed instrument, though no seal or scroll be annexed to the signature.[5]

§ 196. **Several Persons may Adopt the Same Seal.**—In the first place it may be observed that, it is immaterial who affixes the seal to a deed, whether a party to the deed, or a stranger. By delivering it as his deed the maker adopts the seal. And likewise any number of persons may adopt the same seal,[6] if the intent to adopt it as such is evidenced by the instrument.[7] Where there is but one seal to a contract signed by several persons, it will be presumed to be the seal of the party whose name is prefixed to it. But upon proof of its being attached by the authority of the other parties to the contract, it will be held to be the seal of all.[8]

[1] Jenkins v. Hurt, 2 Rand. (Va.) 446; Dening v. Billett, 1 Blackf. (Ind.) 241.

[2] Williams v. Starr, 5 Wis. 549. Unsealed deed conveys equitable title. Drentzer v. Baker, 60 Wis. 179.

[3] Lee v. Adkins, Minor (Ala.), 187; Boynton v. Reynolds, 3 Mo. 79; Long v. Long, 1 Morris (Iowa), 43; Grimsly v. Riley, 5 Mo. 280; Walker v. Keile, 8 *Id.* 301; Glassock v. Glassock, *Id.* 577; Armstrong v. Pearce, 5 Harr. (Del.) 351; Bell v. Keefe, 13 La. Ann. 524.

[4] Groner v. Smith, 49 Mo. 318; Lewis v. Overby, 28 Gratt. 627.

[5] Williams v. Young, 3 Ala. 145; Moore v. Leseur, 18 *Id.* 606; Shelton v. Armor, 13 Ala. 647; Goodlett v. Hansell, 56 Ala. 346. But see Mitchell v. Parham, Harp. (S. C.) 1.

[6] Shep. Touch. Prest. ed. 54, 57; 1 Wood on Conv. 192; Co. Litt. 6 *a*; Mackay v. Bloodgood, 9 Johns. 285; Bank of Cumberland v. Bugbee, 19 Me. 27; Yale v. Flanders, 4 Wis. 96; Bohannons v. Lewis, 3 T. B. Mon. (Ky.) 376; Carter v. Chaudron, 21 Ala. 72; Williams v. Greer, 12 Ga. 459.

[7] Norvell v. Walker, 9 W. Va. 447.

[8] Van Alystyne v. Van Slyck, 10 Barb. 383; Yarborough v. Monday, 2

§ 197.—**Corporate Seals.**—Corporations ordinarily have and use a common seal. But a deed of a corporation may be good, sealed with any seal, if adopted and used by such corporation.[1] It must, however, be shown to have been so adopted.[2] And the seal must be affixed by some one duly authorized to affix it.[3] In the absence of proof to the contrary, the court will presume, when the instrument is signed by the proper officer, that the seal was affixed by him by the express authority of the corporation.[4] It devolves upon the party contesting the validity of such deed, to overthrow the the presumption that it was regularly and duly executed.[5]

ARTICLE IV.

ATTESTING WITNESSES.

SECTION.

199. No witnesses required at common law.
200. The number of witnesses required in different States.
201. Qualification of the witnesses.
202. Witness must sign at grantor's request.

§ 199. **No Witnesses Required at Common Law.**—As a matter of proof that an instrument has been executed by

Dev. (N. C.) L. 493; Davis v. Burton, 4 Ill. 41; McLean v. Wilson, *Id.* 50; Lunsford v. La Motte Lead Co., 54 Mo. 426.

[1] Stebbins v. Merritt, 10 Cush. 27, 34; Mill Dam Foundry v. Hovey, 21 Pick. 417, 428; Tenney v. Lumber Co., 43 N. H. 343; Ang. & Ames on Corp. § 225; Com. Dig., Fait, A. 2.

[2] If a plaster of wax be used as a seal, it must be proven that it was adopted by the corporation, and ordered to be used in that particular case. Perry v. Price, 1 Mo. 645, 664.

[3] Koehler v. Black River, etc. Co. 2 Black. 715; Jackson v. Campbell, 5 Wend. 572.

[4] Musser v. Johnson, 42 Mo. 74; Chouquette v. Barada, 33 *Id.* 249; Riley v. Chouquette, 18 *Id.* 220; Sheehan v. Davis, 17 Ohio St. 571; Jackson v. Campbell, 5 Wend. 575; Lovett v. Steam Saw Mill Association, 6 Paige, 54.

[5] Miner's Ditch Co. v. Zellerbach, 37 Cal. 543.

the party by whom it purports to be have been done, it is necessary in some of the States that there should be witnesses of the fact. This attestation was not essential at common law, and is unnecessary in many of the States. But in other States a deed is invalid, unless attested by one or more witnesses according to the statutory requirements.[1]

§. 200. **The Number of Witnesses Required in the Different States.**—In Mississippi and Maryland, and some of the other States, one witness is sufficient.[2] In Delaware, Georgia, Connecticut, Michigan, Minnesota, New Hampshire, Ohio, Kentucky, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Wisconsin, West Virginia and South Carolina—in fact, most of the States, two witnesses are required.[3] In New Hampshire and Kentucky a deed without witnesses has been held good between the parties.[4] And in Vermont a deed having but one witness was permitted to be used in evidence in any action to compel specific performance of a contract to convey by a sufficient deed.[5] In Michigan, where two witnesses are required, though it was originally held that a deed attested by one only would have no effect to convey the land,[6] the Supreme Court has announced the doctrine that the title may pass without witnesses or acknowledgment, but cannot be fully protected.[7]

[1] Stimson's Amer. Stats., §§ 1566, 1567.

[2] Shirley v. Fearne, 33 Miss. 653; Rev. Code of Maryland, 1878, p. 383, § 3.

[3] Rev. Code of Delaware, ch. 83, § 3; Georgia Code, 1873, § 2690; Gen. Stats. Conn., 1875, p. 352, § 5; Comp. Laws of Michigan, 1871, vol. 2, p. 1342, § 8; Stat. Minn., 1873, vol. 1, p. 637, § 7; Gen. Stats. New Hampshire, p. 251, § 3; Gen. Stats. Ky., 1879, p. 257, § 15; Rev. Stats. South Carolina, 1873, p. 423, § 4; Gen. Stat. Vt., p. 450, § 18. See Stimson's Amer. Stat., 1566. And see Kenyon v. Segar, 14 R. I. 490. In Minnesota, to pass the title it is not necessary that a deed should be witnessed. Morton v. Leland, 27 Minn. 35; Conlon v. Grace (Minn.), 30 N. W. Rep. 880.

[4] Kingsley v. Holbrook, 45 N. H. 320; Fitzhugh v. Croghan, 2 J. J. Marsh. 429.

[5] Day v. Adams, 42 Vt. 510; Vermont Mining Co. v. Windham Bank, 44 Vt. 489.

[6] Crane v. Reeder, 21 Mich. 24.

[7] Price v. Haynes, 37 Mich. 487.

In New York, where a deed is not acknowledged previous to delivery, it must be attested by at least one witness, or it will not take effect as against a purchaser until acknowledged.[1] In Alabama the deed must be attested by one witness where the grantor writes his own name, and by two witnesses when he cannot write.[2] In that State, however, the certificate of acknowledgment operates as a substitute for the attestation of witnesses;[3] but in order to make a deed valid, there must be one or the other.[4]

§ 201. **Qualification of the Witnesses.**—In Connecticut both witnesses must be competent to testify, at the time of attesting the deed.[5] But in New Hampshire, if one of them be competent to testify when such attestation is to be proved, that is sufficient.[6] A subscribing witness to a deed is within the same principle which allows the subscribing witness to a will to give his opinion of the sanity of the testator, and may give his opinion, though not as an expert, to the competency of a grantor to contract, at the time of the execution.[7] The wife of a grantor is not a competent witness to attest his deed.[8] And a grantor in a joint deed cannot be a witness of its execution by his co-grantors.[9] A statute, which requires that conveyances of land shall be attested by witnesses, intends an attestation by witnesses who at the time are disinterested.[10] But it does not affect

[1] Genter v. Morrison, 31 Barb. 155.

[2] Code, 1876, §§ 2145, 2146; Goodlett v. Hansell, 56 Ala. 346; Lord v. Folmar, 57 Ala. 615; Bank of Kentucky v. Jones, 59 Ala. 123. And it was lately held that a deed signed by grantor, but not acknowledged, and attested by two witnesses, one of whom signed by a mark only and the name of the other was written by the grantor, was invalid to pass title. Stewart v. Beard, 69 Ala. 470.

[3] Sharp v. Orme, 61 Ala. 263.

[4] Goodlett v. Hansell, 56 Ala. 346.

[5] Winstead Savings Bank v. Spencer, 26 Conn. 195.

[6] Frink v. Pond, 47 N. H. 125.

[7] Brand v. Brand, 39 How. Pr. 193.

[8] Corbett v. Norcross, 35 N. H. 99. But otherwise where deed is by husband as administrator. Carter v. Jackson, 58 N. H. 156.

[9] Townsend v. Downer, 27 Vt. 119.

[10] A stockholder of a private pecuniary corporation is not qualified to

the validity of the attestation of a witness, if he afterwards acquires an interest therein.[1] In Alabama attesting witnesses must be able to write their own names.[2]

§ 202. **Witness Must Sign at the Grantor's Request.**— Where witnesses are required, it is common to append to the deed a certificate to the effect that the same was "signed, sealed and delivered in the presence of" the witnesses subscribing the same. It is not necessary, however, in order to a sufficient attestation of a deed, that the witnesses should have seen the party write his name. It is sufficient if the latter asked the witnesses to subscribe to the attesting clause, and they did so in the signer's presence.[3]

ARTICLE V.

OF THE DELIVERY OF A DEED.

SECTION

204. A deed takes effect from delivery—Presumption as to the time of delivery.
205. What will amount to a delivery of a deed.
206. The question of delivery always one of intention.
207. The delivery must be known and assented to by the grantee.
208. Delivery to third person for the grantee's use.
209. The time at which the title passes.
210. Of the doctrine of relation in deeds.
211. Effect of a subsequent ratification.
212. Effect of registration in respect to the delivery of a deed.
213. Delivery presumed from possession of the grantee.
214. Acceptance presumed from beneficial nature of the deed, when.
215. Relationship between the party to whom a deed is delivered and the grantee.

be an attesting witness to the execution of a deed to the corporation. Winstead Savings Bank v. Spencer, 26 Conn. 195.

[1] Carter v. Corley, 23 Ala. 612.

[2] Harrison v. Simons, 55 Ala. 510.

[3] Jackson v. Phillips, 9 Cowen, 113; Parke v. Mears, 2 B. & P. 217. The term "subscribing witness" imports that the witness must sign at the request of the grantor. Tate v. Lawrence, 11 Heisk. (Tenn.) 503.

216. Of the delivery of a deed to a married woman.
217. Delivery of a deed to several grantees.
218. Of the delivery of a deed by several joint-owners.
219. Deed of and to a corporation, how delivered.
220. A deed must be completely executed before it can take effect by delivery.
221. A deed once delivered cannot be revoked.
222. The question of delivery always open to proof.
223. What is an *escrow*.
224. Deed never an *escrow* if delivered to the grantee.
225. Deed placed in the hands of a third party when not an *escrow*.
226. Deed delivered as an *escrow* has no effect until condition performed.
227. Effect of second delivery.

§ 204. **A Deed takes Effect from Delivery.**—A deed, duly executed in all other respects, must be delivered before it becomes effective.[1] It takes effect by virtue of, and from delivery, and not from its date;[2] though *prima facie* the date is to be taken as the time of delivery,[3] no legal presumption of delivery arises from signing and acknowledgment.[4] But whether a deed will be presumed to have been delivered before it was acknowledged, when the acknowledgment bears date subsequent to the date of the deed, is a question upon

[1] 1 Wood on Conv. 193; Shep. Touch. 57; Co. Litt. 356, *b*; Com. Dig. Fait., *a*, 3; Oliver v. Stone, 24 Ga. 63; Jackson v. Sheldon, 22 Me. 569; Armstrong v. Stovall, 26 Miss. 275; Cannon v. Cannon, 26 N. J. Eq. 316; Thatcher v. St. Andrew's Church, 37 Mich. 264. Where a deed was never delivered it is void, although it came into possession of person named as grantee and was recorded. Dwinell v. Bliss, 58 Vt. 356.

[2] Fairbanks v. Metcalf, 8 Mass. 230; Mitchell v. Bartlett, 51 N. Y. 453; Tuttle v. Turner, 28 Tex. 759; Blake v. Fash, 44 Ill. 302; City Bank v. McClellan, 21 Wis. 112; Jackson v. Bard, 4 Johns. 230; Harrington v. Gage, 6 Vt. 532; Hood v. Brown, 2 Ohio, 403; Anderson v. Lewis, 1 Freem. (Mich.) Ch. 178.

[3] 1 Wood on Conv. 195; Shep. Touch. 58, 72; Com. Dig. Fait., G; Billings v. Stark, 15 Fla. 297; Ellsworth v. Central R. R. Co., 34 N. J. L. 93; Harrison v. Phillips Academy, 12 Mass. 456; Cutts v. York, etc. Co., 18 Me. 190; Meech v. Fowler, 14 Ark. 29; Smiley v. Fries, 104 Ill. 416; Raines v. Walker, 77 Va. 92; Wheeler v. Single, 62 Wis. 380; Ward v. Daugherty (Cal.), 17 Pac. Rep. 193.

[4] Boyd v. Slayback, 63 Cal. 493; Hill v. McNichol (Me.), 13 Atl. Rep. 883; Alexander v. de Kermel, 81 Ky. 345. And see St. Louis v. Wiggins Ferry Co., 88 Mo. 615.

which the authorities are not agreed. Some of the courts hold that a deed is presumed to have been delivered on the day of its date, notwithstanding it was not acknowledged until afterwards.[1] But others hold that the deed will not be presumed to have been delivered until it was acknowledged.[2] The presumption that a deed remains in the possession of the grantor, until the revenue stamps are cancelled, was also allowed to override the presumption that it was delivered at its date.[3] The presumption in either case is not conclusive, and the true date of delivery may be proved *aliunde*.[4]

§ 205. **What will Amount to a Delivery of a Deed.**— No particular form of procedure is required to effect a delivery:[5] and it is not essential that the paper be actually delivered.[6] It is sufficient if there be an intention or assent of the mind to treat the instrument as a deed.[7] If the grantor, when executing it, intends it as a delivery, and this is known and understood by the grantee, and he and

[1] McConnell v. Brown, Litt. (Ky.) Sel. Cas. 159; Jayne v. Gregg, 12 Ill. 413; Robinson v. Gould, 26 Iowa, 89; Breckenridge v. Todd, 3 T. B. Mon. 52; Ford v. Gregory, 10 B. Mon. 175; Sweetser v. Lowell, 33 Me. 446; Harris v. Norton, 16 Barb. 264; Darst v. Bates, 51 Ill. 439.

[2] Blanchard v. Tyler, 12 Mich. 339; Loomis v. Pingree, 43 Me. 299; Henderson v. Mayor, etc. of Baltimore, 8 Md. 352; Clark v. Akers, 16 Kan. 166; Fontaine v. Boatman's Saving Inst., 57 Mo. 553. And where, a grantee died between the date of the deed and its acknowledgment, it was presumed that the deed had been delivered in his life-time. Eaton v. Trowbridge, 38 Mich. 454.

[3] Van Rensselaer v. Vickery, 3 Lans. 57.

[4] Barry v. Hoffman, 6 Md. 68; Fairbanks v. Metcalf, 8 Mass. 230; Harrison v. Phillips Academy, 12 Mass. 456; Treadwell v. Reynolds, 47 Cal. 171. Parol evidence is admissible to show the true date of delivery. Cook v. Knowles, 38 Mich. 316.

[5] Warren v. Swett, 31 N. H. 332; Burkholder v. Casad, 47 Ind. 418.

[6] Farrar v. Bridges, 5 Humph. 411; Walker v. Walker, 42 Ill. 311; McLure v. Colclough, 17 Ala. 89; Dayton v. Newman, 19 Pa. St. 194.

[7] Byers v. McClanahan, 6 Gill & J. 250; Stewart v. Reddirt, 3 Md. 67; Crawford v. Berthold, 1 N. J. Eq. 458; Thompson v. Hammond, 1 Edw. Ch. (N. Y.) 497; Rivard v. Walker, 39 Ill. 413; Stevens v. Hatch, 6 Minn. 64; Warren v. Swett, 31 N. H. 332; Burkholder v. Casad, 47 Ind. 418; Dukes v. Spangler, 9 Cent. L. J. 398.

the grantor go on and act as if the estate had actually passed thereby, it will have that effect,[1] though the instrument be left in the possession of the bargainor,[2] or in the hands of a third person and never called for.[3] Numerous instances might be cited, showing that manual investiture is not essential to the valid delivery of a deed. Thus, for instance, where a wife, wishing to convey her land to her husband through a third person, joined with him in making a deed, which was left upon their table till the next morning, when the grantee came and executed a deed to the husband, who took both deeds and put them on record, it was held a good delivery.[4] And when one purchased land, and at his request the same was deeded to another, although the purchaser received and retained the deed, without disclosing its existence to the grantee, and took and retained possession of the land, yet it was held that the title passed and vested in the grantee.[5] So where a father had executed a conveyance of realty to his infant son, but had retained the deed in his possession, and had in various ways indicated his intention that the property in question should be thus bestowed at his death, it was held that effect should be given to his intention, notwithstanding there had been no manual delivery.[6] And where a father made a deed to his minor son and caused it to be recorded, it was held to be a sufficient delivery to the infant, and that the title passed thereby.[7] The law pre-

[1] Walker v. Walker, 42 Ill. 311. And see Thatcher v. St. Andrews Church, 37 Mich. 264; Rogers v. Carey, 47 Mo. 235.

[2] Farrar v. Bridges, 5 Humph. 411; Methodist Church v. Jaques, 1 Johns. Ch. 450; Souverbye v. Arden, 1 Johns. Ch. 230; Scrugham v. Wood, 15 Wend. 545. But see Cook v. Brown, 34 N. H. 460; Johnson v. Farley, 45 N. H. 505.

[3] Jamison v. Craven, 4 Del. Ch. 311.

[4] Folly v. Vantuyl, 9 N. J. L. 153; Somers v. Pumphrey, 24 Ind. 240; Pennsylvania Co. v. Dovey, 64 Pa. St. 260.

[5] Everett v. Everett, 48 N. Y. 218.

[6] Newton v. Bealer, 41 Iowa, 334. But *contra*, Fain v. Smith, 14 Oreg. 82. And see Stone v. French (Kan.), 14 Pac. Rep. 530.

[7] Cecil v. Beaver, 28 Iowa, 241; Folk v. Varn, 9 Rich. Eq. 303; McEwen v. Troost, 1 Sneed, 186; Corley v. Corley, 2 Coldw. 520. A father's testimony that he intended to deliver a deed to his son at the time of its

sumes more in favor of the delivery of a deed in case of a voluntary settlement, especially when made to an infant;[1] but the mere signing and acknowledgment of a deed, unsupported by acts or declarations on the part of the grantor, showing an intention to part with the property, will in no case operate to pass the title.[2] To constitute a delivery, the instrument must either pass into the power of the grantee, or some one for him, so as to be beyond the control of the grantor, or the grantor must unequivocally indicate his intention that it shall take effect as a conveyance of the property.[3]

§ 206. **The Question of Delivery is Always one of Intention of the Parties.**—In all cases an intention that the deed shall be delivered and become effective must exist.[4] And,

execution, *held* to establish the fact that the title then passed to the son, although ten years had elapsed before it was recorded, the father meanwhile keeping it as guardian. Tallman v. Cook, 39 Iowa, 402.

[1] Bryan v. Wash, 7 Ill. 557; Reed v. Douthit, 62 Ill. 348. A voluntary deed may be constructively delivered. Wall v. Wall, 30 Msss. 91.

[2] Cannon v. Cannon, 26 N. J. Eq. 316; Ward v. Ward, 2 Hayw. 226; Burkholder v. Casad, 47 Ind. 418; Patterson v. Snell, 67 Me. 559. A deed signed and acknowledged, but found in the grantor's possession at the time of his death, will be presumed never to have been delivered. Burton v. Boyd, 7 Kan. 17.

[3] Fisher v. Hall, 41 N. Y. 416; Duer v. James, 42 Md. 492; Huey v. Huey, 65 Mo. 689; Healdsburg v. Bailhache, 65 Cal. 327. Evidence of the grantor's acts, or declarations, in accordance with the effect of his conveyance held competent presumptive evidence of its delivery. Tipton v. Ross, 10 Ohio, 273. See Prutsman v. Baker, 30 Wis. 644; Gage v. Gage, 36 Mich. 229; Bailey v. Bailey, 7 Jones (N. C.), L. 44. Where a conveyance was subscribed and sealed by the grantor, attested by the witnesses under a clause stating that it had been sealed and delivered in their presence, but the grantee was not then present and remained ignorant of the existence of the deed until long after the death of the grantor, and the grantor continually remained in the possession of the premises described until his death, when the deed was found among his papers, it was held that such a conveyance was wholly inoperative to pass the title, and no delivery thereof to the grantee could be presumed or inferred from these facts. Fisher v. Hall, 41 N. Y. 416. But a deed delivered by a grantor to a third person, with direction to hand it over to the grantee immediately after his death, may be valid. Crooks v. Crooks, 34 Ohio St. 610; Latham v. Udell, 38 Mich. 238. See *Infra*, §§ 208-211.

[4] Steele v. Miller, 40 Iowa, 402; Burkholder v. Casad, 47 Ind. 418;

therefore, it is essential that the deed be understood by the parties to be completed and ready for delivery, in order to have the mere placing of it in the hands of the grantee or his agent construed into a delivery.[1] Nor is the mere delivery of a deed to the grantee for purposes of inspection, or to hold while he shall consider whether he will accept it, a valid delivery.[2] Where a deed was placed in the hands of a third person for safe keeping, who, without the knowledge of the grantor, delivered it to the grantee, it was held not to be a sufficient delivery.[3] And if a deed duly executed in all respects except delivery be stolen from the grantor, it passes no title, even to a *bona fide* purchaser from the grantee named in the deed.[4] Though, if the grantor has been guilty of negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in a place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons, he will be estopped from setting up his title as against a

Stiles v. Probst, 69 Ill. 382; Brittain v. Work, 13 Neb. 347; Jordan v. Davis, 108 Ill. 336. The manual delivery of a deed will not be regarded as a full and complete delivery, when it is mutually understood at the time, between grantor and grantee, that such a deed is not to become operative until some future event. Arthur v. Anderson, 9 S. C. 234; Frazer v. Davie, 11 S. C. 56. But where a party acknowledges before a proper officer the execution of a deed made by him and allows the officer to hand the same to the grantee without objection, this will amount to a consent to its delivery. Hewitt v. Clark, 91 Ill. 605.

[1] Stiles v. Probst, 69 Ill. 382; Conlon v. Grace (Minn.), 30 N. W. Rep. 880; Hill v. McNichol (Me.), 13 Atl. Rep. 883. But if intended to pass the estate, the mere fact that the parties supposed the deed would not take effect until recorded, will not prevent its taking effect. Hinchliff v. Hinman, 18 Wis. 130; Walker v. Renfro, 26 Tex. 142.

[2] Graves v. Dudley, 20 N. Y. 76; Ford v. James, 2 Abb. N. Y. Ct. App. Dec. 159; Hoag v. Owen, 60 Barb. 34. And cannot operate as a contract or memorandum of an agreement to convey the land, within the statute of frauds. Comer v Baldwin, 16 Minn. 172.

[3] Barlow v. Hinton, 1 A. K. Marsh. 97. Or upon performance of specified condition, its delivery before condition has been performed is ineffective. White v. Core, 20 W. Va. 272.

[4] Tisher v. Beckwith, 30 Wis. 55.

bona fide purchaser for value, under such deed.[1] Where a deed has been obtained surreptitiously, and placed upon record by the grantee, nothing short of an explicit ratification of the deed, or such an acquiescence, after a knowledge of the facts, as would raise a presumption of express ratification, can give it validity.[2]

But if a deed is in fact delivered, even though it be in consequence of false and fraudulent pretenses, and the grantee conveys to an innocent third party, it passes a good title.[3]

§ 207. **The Delivery must be Known and Assented to by the Grantee.**—There must not only be an assent on the part of the grantor to deliver the deed, but also on the part of the grantee to accept it.[4] Therefore, a deed cannot become operative by delivery after the death of either of the parties.[5] That is, there must be an actual or constructive delivery during the life of the grantor, or a delivery after his death which takes effect by relation at some period during his life.[6] Where a conveyance was executed to a grantee

[1] *Ibid.* Where a husband made a deed of lands to his wife for the purpose of showing it to a creditor, to obtain an extension of time, and did not deliver it corporally to the wife, but placed it with other papers in their house, which were accessible to her, and she afterwards placed it on record, it was held a good delivery of the deed to her. Gage v. Gage, 36 Mich. 229.

[2] Hadlock v. Hadlock, 22 Ill. 384.

[3] Berry v. Anderson, 22 Ind. 41.

[4] Commonwealth v. Jackson, 10 Bush, 424; Woodbury v. Fisher, 20 Ind. 389; Cooper v. Jackson, 4 Wis. 537; Comer v. Baldwin, 16 Minn. 172; Mitchell v. Ryan, 3 Ohio St. 377. When a conveyance describes the land incorrectly, and the land is afterwards sold under execution against the grantee, the subsequent delivery of a correct deed to the purchaser at execution sale is not constructive delivery of such deed to the grantee, so as to pass the title through him, unless he voluntarily accepts the deed. Rogers v. Carey, 47 Mo. 232.

[5] Wiggins v. Lusk, 12 Ill. 132; Jackson v. Leek, 12 Wend. 107; Fisher v. Hall, 41 N. Y. 423; Fay v. Richardson, 7 Pick. 91; Miller v. Physick, 24 Ark. 244; Otto v. Doty, 61 Iowa, 23. See § 211.

[6] That a deed is not to be delivered or take effect until after the grantor's death, will not prevent its taking effect at that time. Howard v.

who died without knowledge of its having been made, it was held not to be a sufficient acceptance, notwithstanding the deed had been executed in pursuance of a prior agreement between the parties.[1]

§ 208. **Delivery to a Third Person for the Grantee's Use.**—It is not essential to the valid delivery of a deed that the grantee be present. The delivery may be made, at his request, to some person for him.[2] For example, where the grantor made a deed which the grantee saw, and the grantor agreed to put it on record, and did so, but in the absence of the grantee, and without formal delivery, it was held to be a good delivery, the register being by such assent constituted the agent to accept the delivery.[3] And if a delivery absolute as to the grantor be made to an unauthorized third person, for the grantee's use, and the grantee accepts it, it is a good delivery, provided the rights of third persons have not intervened.[4] But it has been held that the delivery of conveyance to an attorney employed by the grantee to examine the title, and who is not the agent or attorney in fact of the grantee, is not a delivery to the grantee if the latter refuses to construe it.[5] The delivery of a deed by the

Patrick, 38 Mich. 796. For the qualification of this doctrine see *Infra*, § 208, *et seq.*

[1] Jackson v. Phipps, 12 Johns. 421.

[2] Fewell v. Kessler, 30 Ind. 195; Hatch v. Bates, 54 Me. 136; Hatch v. Hatch, 9 Mass. 307; Turner v. Whidden, 22 Me. 121; Guest v. Beeson, 2 Houst. 246; Morrison v. Kelly, 22 Ill. 610; Cincinnati R. R. Co. v. Iliff, 13 Ohio St. 235; Stephens v. Huss, 54 Pa. St. 20; Eckman v. Eckman, 55 *Id.* 269. The title will pass although the deed be lost while in such hands. Henrichsen v. Hodgen, 67 Ill. 179.

[3] Cooper v. Jackson, 4 Wis. 537. The delivery of a deed to the grantee, after its record, by the recording officer, under the direction of the grantor, is a good delivery. Kemp v. Walker, 16 Ohio, 118.

[4] McPherson v. Featherstone, 37 Wis. 632; Bell v. Farmer's Bank, 11 Bush, 34; Brown v. Austen, 35 Barb. 341; Stewart v. Weed, 11 Ind. 92; Guard v. Bradley, 7 Ind. 600; Marsh v. Austin, 1 Allen, 235; Bennett v. Waller, 23 Ill. 97. Putting a deed in the post office, addressed to the grantee, held a sufficient delivery. Kemp v. Walker, 16 Ohio. 118.

[5] Carnes v. Platt, 7 Abb. Pr. (N. S.) 42. And see Hale v. Joslin, 134 Mass. 310; Byington v. Moore, 62 Iowa, 470; Hammerslough v. Cheatham, 84 Mo. 13.

grantor to the officer taking the acknowledgment, with unqualified instructions to deliver it to the grantee whenever he calls for it, followed by an acceptance of the title to the land conveyed, operate to invest the grantee with the title to the land, although for convenience merely the grantee permits the officer to retain possession of the deed.[1] So if, after a deed has been recorded for him, the grantee assents to it, it becomes a good delivery.[2] But any lien or attachment placed upon the land as the property of the grantor, before such assent, will hold.[3]

§ 209. **In Respect to the Time at which the Title Passes,** in the cases mentioned in the preceding section, the authorities are not uniform. One class of cases hold that the delivery of a deed to a stranger or the recording officer passes the title, *eo instanti*, on the ground that the law presumes an acceptance by the grantee of that which is beneficial to him: but that, if the grantee does dissent, the title does not pass, or revests in the grantor.[4] It seems that where a grant is a pure unqualified gift, the presumption of acceptance can only be rebutted by proof of actual dissent,[5] especially if the grantees are infants, or persons under disa-

[1] Black v. Hoyt, 33 Ohio St. 203.

[2] Hedge v. Drews, 12 Pick. 141; Masterson v. Cheek, 23 Ill. 72; Prettyman v. Goodrich, *Id.* 330; Jackson v. Cleveland, 15 Mich. 94; Boody v. Davis, 20 N. H. 140; Carver v. Jackson, 4 Pet. 1; Rathbun v. Rathbun, 6 Barb. 98; Snider v. Lackenour, 2 Ired. (N. C.) Eq. 360; Kemp v. Walker, 16 Ohio, 118.

[3] Denton v. Perry, 5 Vt. 382; Johnson v. Farley, 45 N. H. 505; Derry Bank v. Webster, 44 N. H. 264; Elmore v. Marks, 39 Vt. 538, 542; Jackson v. Cleveland, 15 Mich. 101; Parmelee v. Simpson, 5 Wall. (U. S.) 81; Baker v. Haskell, 47 N. H. 479. But see Tompkins v. Wheeler, 16 Pet. 119; Merrills v. Swift, 18 Conn. 257, where an assignment for the benefit of creditors took precedence of an attachment, though not actually accepted until after attachment made.

[4] Stewart v. Weed, 11 Ind. 92; Marsh v. Austin, 1 Allen, 235; Bennett v. Waller, 23 Ill. 97; McLean v. Nelson, 1 Jones, (N. C.) L. 396; Brown v. Austen, 35 Barb. 341; Rogers v. Carey, 47 Mo. 232.

[5] Mitchell v. Ryan, 3 Ohio St. 377. Assignments for the benefit of creditors come within this rule. Wilt v. Franklin, 1 Binn. 502.

bility to assent.[1] But as to whether this presumption of acceptance can ever be raised as a rule of law, except in the case of infant grantees, and such as are under some disability to accept, has been gravely questioned by excellent authority.[2] Upon principle, and according to the weight of authority, a deed cannot become effective by delivery until some act has been done by the grantee equivalent to acceptance.[3] "It is essential to the validity of a deed, if not actually delivered to the grantee, or his agent authorized to receive it, to prove notice to him of its existence, and such additional circumstances as will afford a reasonable presumption of his acceptance of it."[4] In this case the court held that a deed delivered to the registering officer, or an unauthorized third person, and subsequently accepted by the grantee, will take effect, as between the parties, from the time of the first delivery, but as to persons who have acquired rights in the property before the date of the actual acceptance, it is not to be regarded as taking effect until the latter date.[5]

§ 210. **The Doctrine of Relation.**—There is a rule, applicable to cases where the transaction is not complete in itself, but depends upon divers concurrent acts, by which the several parts or ceremonies necessary to complete a conveyance are taken together as one act, and operate from the original act by relation.[6] As an illustration, the case of sheriff's sales upon execution, may be referred to, where no deed is delivered until a subsequent period, during which

[1] Rivard v. Walker, 39 Ill. 413; Spencer v. Carr, 45 N. Y. 407; Cecil v. Beaver, 28 Iowa, 241.

[2] 3 Washb. on Real Prop., 4th ed., 284, 292, and cases cited.

[3] Hulick v. Scovil, 9 Ill. 159; Bell v. Farmer's Bank, 11 Bush, 34; Townson v. Tickell, 3 B. & Ald. 36; Young v. Guilbeau, 3 Wall, 636, 641; Jackson v. Phipps, 12 Johns. 422; Wilsey v. Dennis, 44 Barb. 359; Fonda v. Sage, 46 Barb. 123; Foster v. Beardsley Co., 47 Barb. 513.

[4] Bell v. Farmer's Bank, 11 Bush, 34.

[5] *Ibid.*

[6] Johnson v. Stagg, 2 Johns. 520; Jackson v. McCall, 3 Cowen, 75; Crowley v. Wallace, 12 Mo. 143.

time the judgment debtor may have died, and where an execution title relates back to the time of the attachment creating the lien, which is perfected by the sale under such execution, and cuts out intermediate conveyances.[1] There are also many other cases in which a conveyance will be deemed to relate back to the inception of title, and render valid any intermediate disposition of the land by the grantee of such conveyance.[2] On the other hand, "it is a general rule with respect to the doctrine of relation, that it shall not do wrong to a stranger. As between the same parties, it may be adopted for the advancement of justice."[3]

§ 211. **Effect of a Subsequent Ratification.**—A delivery may be made good by the subsequent assent of the grantee in the deed, upon the principle that "every subsequent ratification has a retrospective effect, and is equivalent to a prior command."[4] Thus, a deed delivered to a stranger for the grantee's use, without his knowledge, may become effectual the moment it is assented to by him, though the grantor may have deceased before such assent.[5] Where a father made a deed to his son and placed it in the hands of a stranger to be delivered to the grantee on the grantor's death, all of which being done, it was held that the estate vested in the grantee from the time of the first delivery.[6]

[1] Smith v. Allen, 1 Blackf. 22; Pierce v. Hall, 41 Barb. 142; Heywood v. Hildreth, 9 Mass. 393; Taylor v. Robinson, 2 Allen, 564.

[2] Johnson v. Stagg, 2 Johns. 520.

[3] Van Court v. Moore, 26 Mo. 92; Jackson v. Bard, 4 Johns. 230; Pierce v. Hall, 41 Barb. 142.

[4] Co. Litt. 207, *a;* Story on Agency (7th ed.), 102; Broom's Leg. Max. (3d London ed.) 715; 2 Bouv. Inst. 25; 4 *Id.* 26; Kingsbury v. Burnside, 58 Ill. 310. The ratification may be indicated by any words or acts of the grantee which show a clear intention on his part that the deed shall be considered as having been properly executed and delivered, and as conveying the title to the property. Tucker v. Allen, 16 Kas. 312; Gould v. Day, 94 U. S. 405.

[5] Mather v. Corliss, 103 Mass. 568; Stephens v. Rinehart, 72 Pa. St. 434; Kingsbury v. Burnside, 58 Ill. 310.

[6] Foster v. Mansfield, 3 Metc. 412; Hatch v. Hatch, 9 Mass. 307; Stephens v. Huss, 54 Pa. St. 26; Brown v. Brown, 1 Woodb. & M. 325; Stephens v. Rinehart, 72 Pa. St. 440; Howard v. Patrick, 38 Mich. 796;

Though, for a subsequent acceptance to give validity to a deed, the delivery must be to the grantee's use, and must be absolute, and continuing in its nature; such as leaving a deed on deposit, to be accepted by the grantee at his election.[1]

The sending of a deed by the grantor to a stranger, or depositing it in a public office, is not a delivery to the grantee, unless it is sent or deposited to his use.[2] When a deed is delivered to a grantee, no words are necessary, as the law presumes in such case that it is for his use; but when delivered to a stranger, there is no such presumption, and the intent on the part of the grantor to make it his effectual deed thereby, must be shown by evidence beyond such delivery.[3] Some of the cases go to the extent that the deposit must be absolute as to the grantor, and beyond his power to recall. In *Cook* v. *Brown*,[4] it was said: "There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled to the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the life-time of the grantor as the latter could not interfere with, in order to have any control over it after his decease." The only

Crooks v. Crooks, 34 Ohio St. 610. And the delivery thereof by such third person before the grantor's death, in breach of the trust, is sufficient to vest the title at the death of the grantor. Wallace v. Harris, 32 Mich. 380.

[1] Hulick v. Scovil, 9 Ill. 177; 1 Wood on Conv. 240; Jackson v. Dunlap, 1 Johns. Cas. 114; Jackson v. Bodle, 20 Johns. 187; Church v. Gilman, 15 Wend. 656, 660; Buffum v. Green, 5 N. H. 71; Johnson v. Farley, 45 N. H. 505.

[2] Elsey v. Metcalf, 1 Denio, 323.

[3] Souverbye v. Arden, 1 Johns. Ch. 255; Church v. Gilman, 15 Wend. 656; 1 Wood on Conv. 195; Elsey v. Metcalf, 1 Denio, 323; Carr v. Hoxie, 5 Mason, 60; Miller v. Physick, 24 Ark. 244.

[4] 34 N. H. 460.

test evidence of a delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance.[1] But in *Belden* v. *Carter*,[2] it appeared that A., having signed, sealed and acknowledged a deed, conveying a tract of land to B., took up the deed in the absence of B., and said to C., "Take this deed and keep it. If I never call for it, deliver it to B., after my death; if I call for it, deliver it up to me." C. took the deed; A. died soon afterwards, having never called for it, and C delivered it over to B. It was held that this was the deed of A. presently; that C. held it in trust for B.; that the title became consummate in B. by the death of A., and that the deed took effect by relation from the time of the first delivery. These instances will serve to illustrate the diversity of opinion on the subject. A delivery after the death of a grantor, to become effective, must be made by some person holding the deed as trustee, or having the same in his possession as an *escrow*.[3] "The mere lodgment of a deed, properly executed and acknowledged by the grantor, in a place to which the grantee has access, and from which he can, without hindrance, transfer it to his own possession, with intent on the part of the grantor that the grantee may, after his death, take it, and have it recorded, and then become the owner of the land, does not constitute delivery of the deed; and the taking and recording of the deed after the death of the grantor, is ineffectual to perfect it."[4]

§ 212. **Effect of Registration in Respect to Delivery.**— Registration of a deed will not supply the place of delivery.[5] Though if the recording is intended as a delivery and is

[1] Prutsman v. Baker, 30 Wis. 644; Baker v. Haskell, 47 N. H. 479; Phillips v. Houston, 5 Jones, L. 302; Bailey v. Bailey, 7 Jones, L. 44; Deordorff v. Forman, 14 Am. L. Reg. 545; Brown v. Brown, 66 Me. 316.

[2] 4 Day, 66. And see Stone v. Duvall, 77 Ill. 475.

[3] Wheelwright v. Wheelwright, 2 Mass. 447.

[4] Huey v. Huey, 65 Mo. 689. But see Gage v. Gage, 36 Mich. 229.

[5] Berkshire, etc. Ins. Co. v. Sturgis, 13 Gray, 177; Jones v. Bush, 4 Harr. (Del.) 1; Hawkes v. Pike, 105 Mass. 560; Maynard v. Maynard, 10 Mass. 456; Hadlock v. Hadlock, 22 Ill. 384; Patterson v. Snell, 67 Me. 559; Hendricks v. Rasson, 53 Mich. 575.

known to the grantee and he assents to it, the deed will take effect from the date of his assent.[1] And where the grantor causes the deed to be recorded, this may furnish presumptive evidence of his intention to part with the title thereby conveyed,[2] and is a sufficient delivery to enable the grantee to hold the land as against the grantor.[3] Where a deed to a child was absolute in form and beneficial in effect, and the grantor and father voluntarily caused the same to be recorded, it was held to be a sufficient delivery, and that the title passed thereby.[4] The record of a deed, showing that it has been duly executed and acknowledged, raises a legal presumption that it has been delivered.[5] But this presumption may be controlled by other evidence.[6] For example, it has been held that such presumption is repelled, when it appears that the grantee never was in possession, and no claim was made under the deed; that the land was improved and valuable only for its use and occupation; and that the grantor, his heirs and representatives, have remained in undisturbed possession for a period of more than forty years without recognizing any rights under the deed. In such case a contrary presumption arises, either that the deed was never de-

[1] Barns v. Hatch, 3 N. H. 304; Jackson v. Richards, 6 Cow. 617; Elsey v. Metcalf, 1 Denio, 326; Parker v. Hill, 8 Metc. 447; Oliver v. Stone, 24 Ga. 63; Hedge v. Drew, 12 Pick. 141; Boody v. Davis, 20 N. H. 140.

[2] Kerr v. Birnie, 25 Ark. 225; Hammell v. Hammell, 19 Ohio. 17; Boardman v. Dean, 34 Pa. St. 252; Metcalfe v. Brandon, 60 Miss. 685; Alexander v. Alexander, 71 Ala. 295; Walton v. Burton, 107 Ill. 54. But held that recording alone will not support presumption of delivery. Gifford v. Corrigan (N. Y.), 11 N. E. Rep. 498. And in a late Maine case it was held that neither the words signing, sealing and acknowledging, nor the fact that it has been recorded, afford any evidence of its delivery. Hill v. McNichol, 13 Atl. Rep. 833.

[3] Kerr v. Birnie, 25 Ark. 225; Moore v. Giles, 49 Conn. 570.

[4] Cecil v. Beaver, 28 Iowa, 241; Folk v. Varn, 9 Rich. (S. C.) Eq. 303.

[5] Kille v. Ege, 79 Pa. St. 15; Bulkley v. Buffington, 5 McLean, 457; Bensley v. Atwill, 12 Cal. 231; Welborn v. Weaver, 17 Ga. 267; Warren v. Jacksonville, 15 Ill. 236; Bullitt v. Taylor, 34 Miss. 708; Boardman v. Dean, 34 Pa. St. 252; Rigler v. Cloud, 14 Pa. St. 361.

[6] McGraw v. McGraw (Me.), 9 Atl. Rep. 846.

livered or that there was a reconveyance.[1] And registration will not amount to delivery, there not appearing an assent on the part of the grantee, or any knowledge that the deed had been executed in his favor.[2] The same rule holds where the grantee has knowledge of the deed, but his acceptance of it depends upon a condition which he has communicated to the vendor. Thus, where a committee of a private corporation agreed to purchase a tract of land for such corporation provided the purchase should be sanctioned by the board of directors, and the title approved by the legal adviser of the corporation, and the vendor executed a deed, and after notifying the corporation of his intention to do so, but without waiting for the sanction of the board of directors or the approval of the counsel, had the same recorded, it was held that, the acceptance of the deed by the corporation being dependent on events which never occurred, there was no delivery of the deed, and that the mere execution and recording of the deed without the sanction of the corporation was not sufficient to charge the corporation as grantee.[3] On the other hand, if a grantor executes a deed and places it on record without the knowledge of the grantee, and then takes it and does not actually deliver it, no subsequent assent of the grantee will give it effect, if the grantor prior to such assent had concluded not to deliver it, and continued of that mind afterwards.[4] But a subsequent possession of the deed by the grantee would be evidence of its delivery.[5]

[1] Knolls v. Barnhart, 71 N. Y. 474.

[2] Maynard v. Maynard, 10 Mass. 456; Harrison v. Phillips Academy, 12 Mass. 456; Denton v. Perry, 5 Vt. 382; Johnson v. Farley, 45 N. H. 505; Derry Bank v. Webster, 44 N. H. 264; Elmore v. Marks, 39 Vt. 538; Jackson v. Cleveland, 15 Mich. 101; Parmelee v. Simpson, 5 Wall. 81; Baker v. Haskell, 47 N. H. 479; Gregory v. Walker, 38 Ala. 26, 33. But see Tompkins v. Wheeler, 16 Pet. 119; Merrills v. Swift, 18 Conn. 257. When a deed has been once refused by the grantee, its delivery will not be presumed from its subsequent registration; the burden is on the party asserting its acceptance. Gaither v. Gibson, Phill. (N. C.) L. 530.

[3] Leppoc v. Union Bank, 32 Md. 136.

[4] Hatch v. Bates, 54 Me. 139; Hawkes v. Pike, 105 Mass. 560.

[5] Maynard v. Maynard, 10 Mass. 456; Dawson v. Dawson, Rice Ch. 243.

§ 213. **Delivery Presumed from Possession of Deed.** —When a deed is found in the grantee's possession, delivery and acceptance are always presumed.[1] Proof of the execution of a deed, added to its being in the possession of the grantee, is *prima facie* evidence that it was sealed and delivered.[2] And the execution of a deed, in the presence of witnesses, is evidence from which a delivery may be inferred.[3]

§ 214. **Acceptance Presumed from Beneficial Nature of the Deed.**—The beneficial nature of a deed is competent presumptive evidence of its acceptance; and this is strengthened where the grantee, knowing of the deed, enters into possession under it.[4] In regard to the extent allowed to the presumption that a party will accept a deed because it is beneficial to him, the courts, as we have seen, are not agreed.[5] But by the weight of authority it is not to be carried so far as to consider the grantee as having accepted, until notice to him of its existence has been proved, and such additional circumstances as will afford a

[1] Green v. Yarnall, 6 Mo. 326; Chandler v. Temple, 4 Cush. 285; Ward v. Lewis, 4 Pick. 518; Newlin v. Beard, 6 W. Va. 110; Cutts v. York Co., 18 Me. 190; Reed v. Douthitt, 62 Ill. 348; Tuttle v. Turner, 28 Tex. 759; Billings v. Stark, 15 Fla. 297; Carnes v. Platt, 41 N. Y. Sup. Ct. 435; Roberts v. Swearingen, 8 Neb. 363; Tunison v. Chamblin, 88 Ill. 379; Simmons v. Simmons, 78 Ala. 365. But the presumption is the other way, where it remained in the possession of the grantor during his lifetime, though it has been recorded since his death. Patterson v. Snell, 67 Me. 559.

[2] Sadler v. Anderson, 17 Tex. 245; Rhine v. Robinson, 27 Pa. St. 30; Houston v. Stanton, 11 Ala. 412; Sicard v. Davis, 6 Pet. 124; Black v. Thornton, 30 Ga. 361.

[3] Howe v. Howe, 99 Mass. 98; Moore v. Hazelton, 9 Allen, 102; Doe v. Knight, 5 Barn. & Cress. 671; Hope v. Harmen, 16 Q. B. 751; Bunn v. Winthrop, 1 Johns. Ch. 329; Scrogham v. Wood, 15 Wend. 545; St. Louis v. Wiggins Ferry Co. 88 Mo. 615. Proof of execution of a deed implies proof of delivery, unless the objection be raised at the time, during trial. Van Rensselaer v. Secor, 32 Barb. 469.

[4] Stewart v. Weed, 11 Ind. 92; Lampton v. Usher, 7 B. Mon. 57; Tibbals v. Jacobs, 31 Conn. 428; Renfro v. Harrison, 10 Mo. 411; Church v. Gilman, 15 Wend. 656.

[5] *Ante*, § 209.

reasonable presumption of his acceptance of it.[1] Voluntary conveyances, made to infants and persons under disability, and assignments made by debtors in embarrassed circumstances, for the benefit of creditors, may be considered, in some degree, as forming exceptions to the general rule, that an actual acceptance is necessary.[2]

§ 215. **Relationship between Grantor and Grantee, Evidence of Acceptance.**—The relation of the party to whom the deed is delivered, to the estate and the grantee, may be such that acceptance will be implied. For instance, where a person made and executed a deed to a minor, and placed it in the hands of her father, to be retained by him until she should arrive at sufficient discretion to take care of it, the court held that an estate was created in her at the time the deed was delivered to her father, he being her natural guardian.[3]

§ 216. **Delivery of Deed to Married Women.**—If a deed be made to a married woman, and her husband dissents, it is void as to her, at common law.[4] Yet, it is stated, that if the husband expressly assents thereto, the wife or her heirs may, after his death, waive the same.[5] Though, if the grant be to husband and wife, and he assents, she cannot, after his death, avoid the deed by verbal disclaimer of the title.[6]

§ 217. **Delivery of Deed to Several Grantees.**—If there are several grantees in a deed, and the grantor delivers

[1] Commonwealth v. Jackson, 10 Bush, 424; Bell v. Farmer's Bank, 11 Bush, 35; Prutsman v. Baker, 30 Wis. 644; Townsend v. Tickell, 3 Barn. & Ald. 36; Younge v. Guilbeau, 3 Wall. 636; Jackson v. Phipps, 12 Johns. 422; Rogers v. Cary, 47 Mo. 232; Fonda v. Sage, 46 Barb. 109; Hulick v. Scovil, 9 Ill. 159. But see Myrover v. French, 73 N. C. 609.

[2] 3 Washb. on Real Prop., 4th ed., 298; Rivard v. Walker, 39 Ill. 413; Robinson v. Gould, 26 Iowa, 93; Cecil v. Beaver, 28 Iowa, 241. As to assignments for benefit of creditors, see Merrills v. Swift, 18 Conn. 257; Wilt v. Franklin, 1 Binn. 502; Tompkins v. Wheeler, 16 Pet. 119.

[3] Bryan v. Wash, 7 Ill. 557.

[4] 1 Wood on Conv. 240; Melvin v. Props., etc., 16 Pick. 167.

[5] Co. Litt. 3, *a*.

[6] 1 Wood on Conv. 240.

it to one of them, saying nothing of the others, it is no delivery as to them.[1] It may, however, be delivered to one on one day and to another on another day, and thereby take effect as to all.[2] Where a grantee's estate is defeasible on an event, on the happening of which the estate is to go over to others, a delivery of the deed to the first grantee is sufficient for all who take interest under it.[3]

§ 218. **Delivery by Several Joint Owners.**—Where several joint owners of land propose to convey a full title thereto, and all but one of them join in executing a deed of conveyance, and they deliver such deed to a third party to obtain the signature of the other joint owner, and then to deliver it to the grantee, and such joint owner refuses to sign it, the delivery is not complete as to the joint owners who execute the deed, and no title passes by it.[4]

§ 219. **Delivery of Deed by or to a Corporation.**—The deed of a corporation is generally delivered by their common seal being attached to it, with the consent of the corporation. But if, when executing it, they appoint an agent to deliver it, or make other similar provisions, it will not become their deed until formally delivered.[5] Delivery of a deed to the authorized agent of a corporation, is delivery to the corporation, and his acceptance is the acceptance of the corporation.[6]

§ 220. **Must be Completely Executed before Delivery.**—A deed must be completely executed before it can take effect as such by delivery.[7] But an imperfectly executed deed may operate as a contract of sale from the grantor, so as to create an equitable estate in the purchaser,

[1] Hannah v. Swarner, 8 Watts (Pa.), 9.

[2] 1 Wood on Conv. 191.

[3] Folk v. Varn, 9 Rich. (S. C.) Eq. 303.

[4] Overman v. Kerr, 17 Iowa, 485; Tewksbury v. O'Connell, 21 Cal. 61. But see Colton v. Seavey, 22 Cal. 496; Tustin v. Faught, 23 Cal. 237.

[5] 1 Wood on Conv. 194; Com. Dig. Fait, *a* 3.

[6] Western R. R. Co. v. Babcock, 6 Metc. 356.

[7] McKee v. Hicks, 2 Dev. (N. C.) L. 379; Williams v. Sprigg, 6 Ohio St. 585; Brevard v. Neely, 2 Sneed (Tenn.) 164; *ante*, § 18. The execution of a deed includes a delivery. Redman v. Graham, 80 N. C. 231.

if it be plainly shown that the instrument was intended as a conveyance of the land, and was accepted and treated as such by the vendee.[1] If the deed, after delivery, is altered by consent of the parties, and then ratified or delivered, it will be regarded as a new deed, and will take effect from the last delivery.[2] There can be but one delivery of the same deed. Therefore, if a deed be delivered twice, and the first delivery is effectual, the second is simply void. For example, where a deed is merely voidable, as that of an infant, a second delivery after arriving at the age of maturity would be of no effect; but if a deed is void, as of a *feme covert*, if she deliver it after becoming *discovert*, it will give effect to the deed.[3] A deed, void when delivered, may be ratified and confirmed by the grantor, after he has full knowledge of the facts, by any word or act of his which shows a clear intention on his part that the deed shall be considered as having been properly executed and delivered, and as conveying the title to the property.[4] A subsequent acknowledgment of a deed originally void, was held equivalent to a delivery, and to give it effect from that time.[5]

§ 221. **A Deed having been once Delivered cannot be Revoked** by the grantor, and its validity will not be impaired by the deed being taken and retained by him.[6] If it once takes effect by delivery, it cannot be defeated by any subsequent act, except by virtue of some condition contained in the deed itself.[7] Where the grantor, after delivery of the deed, was intrusted with it to get certain informalities corrected, but refused to return it, he was

[1] Williams v. Sprigg, 6 Ohio St. 585.

[2] Stone v. Duvall, 77 Ill. 475.

[3] Shep. Touch., Prest. ed., 60; Perkins, § 154; 1 Wood on Conv. 196; Verplank v. Sterry, 12 Johns. 536.

[4] Tucker v. Allen, 16 Kan. 312.

[5] Osterhout v. Shoemaker, 3 Hill, 513.

[6] Shelton's Case, Cro. Eliz. 7; Connelly v. Skelly, 8 Blackf. 320; Somers v. Pumphrey, 24 Ind. 240; Souverbye v. Arden, 1 Johns. Ch. 240; Reavis v. Reavis, 50 Ala. 60; Warren v. Tobey, 32 Mich. 45. And see Roots v. Holliday, 6 Munf. 251.

[7] Com. Dig. Fait. *a* 36; *ante*, § 20.

decreed to be a trustee for the grantee, and directed to execute the trust by restoring the deed, or, if destroyed, by giving another good and sufficient conveyance of the premises.[1] So, where the grantor executed and delivered a deed to the grantee, but afterwards took it back in order to obtain his wife's relinquishment of dower, the delivery was held sufficient, and the title to the land was vested in the vendee.[2] Or if a deed be delivered back to the grantor for the purpose of having him acknowledge it, or for safe keeping, this is no surrender of the title under the deed.[3] But if the deed were deposited with the grantee for a purpose other than delivery, it would not take effect; nor would a purchaser from the grantee acquire any title under a deed which had not been delivered.[4]

§ 222. **The Question of Delivery always open to Proof.** —Although a deed, when it has once taken effect by delivery, cannot be controlled by parol evidence, it is always competent to show by such evidence, that the deed, though in the grantee's hands, has never been delivered.[5] What amounts to a final delivery of a deed, is a question of law; but whether the facts exist which constitute such delivery, is a question of fact for the jury.[6]

[1] Albert v. Burbank, 25 N. J. Eq. 404; Souverbye v. Arden, 1 Johns. Ch. 246.

[2] Brooks v. Isbell, 22 Ark. 488; Travis v. Tyler, 7 Gray, 146. But when deed was given to third person to deliver to grantee on death of grantor, the grantor may revoke it at any time. Hale v. Joslin, 134 Mass. 310.

[3] Rootes v. Holliday, 6 Munf. (Va.) 251; Hart v. Rust. 46 Tex. 556.

[4] Ford v. James, 2 Abb. Ct. App. Dec. 162.

[5] Roberts v. Jackson, 1 Wend. 478; Black v. Shreve, 13 N. J. Eq. 457; Ford v. James, 2 Abb. Ct. App. Dec. 162; Johnson v. Baker, 4 B. & Ald. 440. It is competent for the jury to infer, from circumstantial evidence, that a deed not delivered at the time of its signature, but deposited in the hands of a third person, was subsequently delivered by the grantor to the grantee. Fellows v. Fellows, 37 N. H. 75.

[6] Earle v. Earle, 20 N. J. L. 347. The question, whether a deed was delivered, although sometimes of a mixed character, partly of law and partly of fact, is generally one of fact only. Hurlbert v. Wheeler, 40 N. H. 73. See Lindsay v. Lindsay, 11 Vt. 621; Dearmond v. Dearmond, 10 Ind. 191.

§ 223. **What is an Escrow.**—We have thus far considered the effect of an absolute delivery, with intent to pass a present title. We come now to notice the effect of the delivery of a deed to a third person not a party to it, to be by him delivered to the grantee upon the performance of certain conditions, such as the payment of money, or the like. A deed thus delivered is called an *escrow*. It is not a perfect deed until delivered upon the performance of the condition;[1] but when so delivered it operates from the time of the first delivery.[2]

§ 224. **Deed never an Escrow if Delivered to the Grantee.**—A deed delivered to the grantee himself, will not be an *escrow*, even though accompanied with an express condition to be performed before it is to take effect. The delivery would be absolute, notwithstanding the condition.[3] But where a deed was handed to the grantee for the purpose of being placed by him in a third person's hands to keep as an *escrow*, and it was so received and transmitted, no title vested in the grantee till a second delivery.[4] Upon the same principle, a deed delivered to the grantee's agent or attorney, as such, will not be deemed an *escrow*.[5] Though,

[1] Cannon v. Handley (Cal.). 13 Pac. Rep. 315; Knoff v. Hansen (Minn.), 33 N. W. Rep. 781 No title passes till condition performed and grantee can acquire no title by merely gaining possession of the deed by theft, fraud or the voluntary act of the depositiary. Daggett v. Daggett (Mass.), 10 N. E. Rep. 311. The condition upon which a deed is placed in *escrow* may be expressed in writing or rest in parol, or be part in writing or part parol. Stanton v. Miller, 58 N. Y. 192.

[2] Shep. Touch., Prest. ed., 58, 59; Williams on Real. Prop. 138.

[3] Fairbanks v. Metcalf, 8 Mass. 230; Worrall v. Munn, 5 N. Y. 229; Braman v. Bingham, 26 N. Y. 483; Lawton v. Sager, 11 Barb. 349; Graves v. Tucker, 18 Miss. 9; Jordan v. Pollock, 14 Ga. 145; Duncan v. Pope, 47 Ga. 445; Miller v. Fletcher, 27 Gratt, 403; Fuller v. Hollis, 57 Ala. 435; State of New Jersey v. Thatcher, 41 N. J. L. 403; McCann v. Atherton, 105 Ill. 31; Stevenson v. Crapnell, 114 Ill. 19.

[4] Simonton's Estate, 4 Watts, 180; Shep. Touch., Prest ed., 59; Jackson v. Sheldon, 22 Me. 569; Gilbert v. N. A. Ins. Co., 23 Wend. 43; Brown v. Reynolds, 5 Sneed, 639; Cherry v. Herring (Ala.), 3 South. Rep. 667. But see Braman v. Bingham, 26 N. Y. 483; Fairbanks v. Metcalf. 8 Mass. 230.

[5] Duncan v. Pope, 47 Ga. 445.

if the grantor deliver his deed to the agent of the grantee, to be by him delivered to the grantee upon the performance of certain conditions, otherwise to return to the grantor, and the agent accepts it on those terms, the delivery will give no effect to the deed unless the conditions are performed.[1] But in a recent Minnesota case the court say that justice or necessity may require the application of a different rule to prevent the operation of the deed from being defeated.[2]

§ 225. **When not an Escrow.**—A deed placed in the hands of a stranger is not an *escrow*, unless some condition is stipulated to be performed before its delivery.[3] Where the manifest intention of the parties to a deed is to make a present conveyance, although the delivery be to await the lapse of time or happening of an event, it will be deemed the grantor's deed immediately.[4] But if the deed is expressly delivered as an *escrow* to be delivered at a future time, or the delivery depends upon the performance of a condition, it is not a present conveyance.[5] In the first instance, if the deed were delivered by the depositary before the time specified, it would not be avoided thereby.[6] And if it is to be delivered at the grantor's death, a quitclaim by the grantee, in the meantime, would pass his estate.[7]

§ 226. **When a Deed has been Delivered as an Escrow, it has no Effect as a Deed until the Condition has been Performed,** even though it be delivered by the depositary to

[1] Southern Life Ins., etc. Co. v. Cole, 4 Fla. 359; Cincinnati, etc. R. R. Co. v. Iliff, 13 Ohio St. 249.

[2] Lindley v. Groff (Minn.), 34 N. W. Rep. 26.

[3] Loubat v. Kipp, 9 Fla. 60; Arnold v. Patrick, 6 Paige, 310; Evans v. Gibbs, 6 Humph, 405; Graves v. Tucker, 18 Miss. 9; Carrick v. French, 7 Humph. 459; Johnson v Branch, 11 Humph. 521; State of New Jersey v. Thatcher, 41 N. J. L. 403.

[4] Perkins, § 143; O'Kelly v. O'Kelly, 8 Metc. 436; Foster v Mansfield, 3 Metc. 413; Shaw v. Hayward, 7 Cush. 175; Murray v. Stair, 2 Barn. & Cress. 82.

[5] Foster v. Mansfield, 3 Metc. 414; Price v. P. & Ft. W., etc. R. R., 34 Ill. 13; Hathaway v. Payne, 34 N. Y. 106; Cook v. Brown, 34 N. H. 465.

[6] Shep. Touch., Prest. ed., 58, 59; Perkins, § 143.

[7] 3 Washb. on Real Prop., 4th ed. 301.

the grantee.[1] The delivery, to be valid, must be with the assent of the grantor. And if the deed be delivered by the depositary without authority, or is obtained from him by the grantee fraudulently, without performance of the condition, it is absolutely void, both as to him and purchasers from him.[2] Nor is an *escrow* which has been signed, sealed and deposited upon a valuable consideration, subject to be revoked or withdrawn by the depositor, except according to the terms of the agreement and deposit. The depositary is as much the agent of the grantee as of the grantor; and he is as much bound to deliver the deed on performance of the condition, as he is to withhold it until performance.[3] The deed thus being in the hands of the agent of the grantee, takes effect as soon as the condition is performed.[4] Where the grantor of a deed retains the right of control over it, notwithstanding its deposit with a third person, with instructions to deliver it to the grantee upon his compliance with specified conditions, it is not an escrow.[5]

§ 227. **Effect of Second Delivery of an Escrow.**— Although a deed, delivered as an escrow, has no effect to pass title until the second delivery, when such delivery is

[1] Abbott v. Alsdorf 19 Mich. 157; Demesmey v. Gravelin, 56 Ill. 93; Dyson v. Bradshaw, 23 Cal. 528; Jackson v. Rowland, 6 Wend. 666; Smith v. South Royalton Bank, 32 Vt. 341; Skinner v. Baker, 79 Ill. 496; Daggett v. Daggett, 143 Mass. 516.

[2] Everts v. Agnes, 4 Wis. 343; *s. c.*, 6 Wis. 453; Dyson v. Bradshaw, 23 Cal. 536; Black v. Shreve, 13 N. J. Eq. 458; Abbott v. Alsdorf, 19 Mich. 158; Cagger v. Lansing, 57 Barb. 421; People v. Bostwick, 32 N. Y. 450; Illinois Central R. R. v. McCullough, 59 Ill. 170; Smith v. South Royalton Bank, 32 Vt. 341. But see Blight v. Schenck, 10 Pa. St. 285; Berry v. Anderson, 22 Ind. 40; Souverbye v. Arden, 1 Johns. Ch. 240; Wallace v. Harris, 32 Mich. 380.

[3] Stanton v. Miller, 65 Barb. 58. But a voluntary conveyance, without consideration, placed in the hands of a custodian may be withdrawn by the grantor at any time before delivery; and if left for delivery upon certain conditions, the custodian is not the judge of whether the conditions have been performed, and he has no right to deliver the same until the donor is satisfied. Hoig v. Adrian College, 83 Ill. 267.

[4] Shirley v. Ayes, 14 Ohio, 308.

[5] Campbell v. Thomas, 42 Wis. 437.

made, it relates back for some purposes to the date of the first.[1] Thus where a deed has been delivered as an escrow, and before the happening of the condition the grantor dies, or, if a *feme sole*, marries, when the condition happens, and the deed is delivered, it takes effect by relation to the first delivery.[2] And yet no estate passes until the second delivery.[3] An attachment levied upon the land as the property of the grantor, before the performance of the condition, would hold, as against the grantee in the deed.[4] The rule is stated in *Butler and Baker's* case as follows: "To some intent the second delivery hath relation to the first delivery, and in some not; and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first. And, therefore, in such case of necessity, *ut res magis valeat quam pereat*, it shall have relation, by fiction, to be made his deed *ab initio* by force of the first delivery." * * * * * * "And yet in truth it was not his deed till the second delivery." [5]

[1] 1 Wood on Conv. 197; Shep. Touch., Prest. ed., 59; Mather v. Corliss, 103 Mass. 568. The general rule is that a deed delivered as an escrow does not take effect so as to divest or invest title until its second delivery, but that the second delivery derives all of its force from the first, of which it is the full execution and consummation. But if equity requires it, the second delivery will be made to relate back to the first, so as to protect the grantee against intervening claims. Simpson v. McGlathery, 52 Miss. 723.

[2] 3 Prest. Abst. Tit., 65; Frost v. Beekman, 1 Johns. Ch. 297; Lindley v. Groff (Minn.), 34 N. W. Rep. 26.

[3] Shep. Touch., Prest. ed., 59; Com. Dig. Fait, A. 4; Black v. Shreve, 13 N. J. Eq. 458; Fairbanks v. Metcalf, 8 Mass. 230, 238; Hinman v. Booth, 21 Wend. 267.

[4] Jackson v. Catlin, 2 Johns. 248; Jackson v. Rowland, 6 Wend. 666; Frost v. Beekman, 1 Johns. Ch. 297. But see Price v. Pittsburg, etc. R. R., 34 Ill. 34, 36; Shirley v. Ayers, 14 Ohio, 310.

[5] 3 Coke Rep. 36.

ARTICLE VI.

POWERS OF ATTORNEY TO EXECUTE DEEDS.

SECTION.

230. Definition and requisites of a power of attorney.
231. Who may appoint an attorney.
232. As to persons acting in an official or fiduciary capacity.
233. Who may act as an attorney.
234. When the authority is conferred upon several.
235. Powers of attorneys are strictly construed.
236. Authority to execute a deed must be express and special.
237. Power to sell land means an absolute sale for cash.
238. How far necessary that the power should identify the land.
239. Of a power to sell land for a specified purpose.
240. Relinquishment of dower by attorney in fact.
241. A power of attorney may be revoked, when.
242. Of the revocation of a power of attorney.

§ 230. **Definition and Requisites of a Power of Attorney.** — A power of attorney has been defined to be "an instrument in writing under seal, by which the party executing it appoints another to be his attorney and empowers him to act for him either generally in all matters or business, or especially to do some specified act or acts, in his name and behalf."[1] If it be intended that an attorney so appointed shall make a complete conveyance of real estate or any interest therein, which by law is required to be by deed, the power of attorney must be executed with like solemnities required in the execution of the deed.[2] An authority to execute a deed must be itself a deed, or in other words, an instrument under seal.[3] And where a statute

[1] Burrill's Law Dict., *Powers of Attorney*.

[2] Clark v. Graham, 6 Wheat. 577. A power of attorney not under seal will be sufficient to authorize the attorney to sell land, but not make a conveyance. Watson v. Sherman, 84 Ill. 263. The authority of an agent to make a contract that his principal will convey land, need not be under seal, nor even in writing. Riley v. Minor, 29 Mo. 439; Rottman v. Wasson, 5 Kan. 552; Champlin v. Parish, 11 Paige, 405; Lawrence v. Taylor, 5 Hill, 113; *ante*, § 7.

[3] Blood v. Goodrich, 9 Wend. 68; Lawrence v. Taylor, 5 Hill, 113;

prescribes certain formalities, and makes them requisite for the execution of an instrument, a power to make that instrument must be itself executed with similar formalities.[1] Therefore, much that has been said with reference to the requisites and manner of executing deeds, will apply equally to powers of attorney, and it remains only for us to notice the points of distinction arising out of the general objects and nature of the latter.

§ 231. **Who may Appoint an Attorney to Execute a Deed.**—As a general proposition it may be said, that any party who is the absolute owner of an estate and can himself execute a conveyance, may authorize another by power of attorney, in writing, to convey it for him. But married women, infants, lunatics and other persons not *sui juris*, are not, in general, capable of appointing an attorney.[2]

Videau v. Griffin, 21 Cal. 389; Rowe v. Ware, 30 Ga. 278; Maus v. Worthing, 4 Ill. 26; Rhode v. Loutham, 8 Blackf. 413; McMenty v. Frank, 4 T. B. Mon. 391; Wheeler v. Nevins, 34 Me. 54; Shuetze v. Bailey, 40 Mo. 69; Smith v. Perry, 29 N. J. L. 74; Kime v. Brooks, 9 Ired. (N. C.) L. 218; Gordon v. Bulkeley, 14 Serg. & R. 331; Smith v. Dickinson, 6 Humph. 261. Although a deed may be ineffectual as a conveyance of the legal title because the authority of the agent was not given by a written instrument under seal, it will be upheld in chancery as evidence of a contract to sell. Morrow v. Higgins, 29 Ala. 448; Shuetze v. Bailey, 40 Mo. 69. By statute in most of the States a power of attorney to convey real estate must be executed, acknowledged or proved and recorded in all respects like deeds. Stimson's Amer. Stat. § 1670.

[1] Gage v. Gage, 30 N. H. 420; Clark v. Graham, 6 Wheat. 577; Butterfield v. Beall, 3 Ind. 203. A power of attorney to convey lands should be proved or acknowledged and left to be recorded in the same manner as the conveyance itself. Moore v. Farrow, 3 A. K. Marsh. (Ky.) 41; Taylor v. McDonald, 2 Bibb (Ky.), 420; Montgomery v. Dorian, 6 N. H. 250. But acknowledging and recording have been held not to be necessary in Georgia, and by a later case in Indiana. Tenant v. Blacker, 27 Ga. 418; Moore v. Pendleton, 16 Ind. 481. The deed will be good against the grantor and his heirs, and create a good title against strangers, though the power is not registered. Walk. Am. Law, 365.

[2] Snyder v. Sponable, 1 Hill, 567; Oulds v. Sansom, 3 Taunt. 261; Bank of Louisville v. Gray (Ky.), 2 S. W. Rep. 168. "Infants and married women are incapable, except under special circumstances. Thus, for example, an infant may authorize another person to do any act which is for his benefit, but he cannot authorize him to do any act which is to his

Though, where it is provided by statute that a married woman may hold real estate and convey the same in the same manner and with like effect as if unmarried, and her deed does not require to be acknowledged by her in person, privily and apart from her husband, no reason is perceived why she may not execute a power of attorney under seal, and empower such attorney to convey in her name.[1] And in many of the States married women are expressly authorized by statute to convey their estates or relinquish their dower by an attorney duly authorized thereto.[2]

§ 232. **Persons Acting in Fiduciary or Official Capacity.**—Generally speaking, persons acting in an official or fiduciary capacity cannot appoint an attorney to act in their stead. The principle is that a delegated authority cannot be again delegated. The principal generally employs the agent from the confidence he reposes in him, and it would be a violation of the trust to transfer the authority to another without the express consent of the party who created the power.[3] Therefore, an attorney has no right to delegate his authority, unless the instrument by which he is appointed expressly authorizes the substitution.[4] It is quite common in the execution of powers of attorney, to insert a clause authorizing the attorney to substitute one or more attorneys under him to do the act and to retain the power

prejudice. So, in regard to married women, ordinarily they are incapable of appointing an agent or attorney. * * * But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, then, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same." Story on Agency, 7th ed., § 6.

[1] Blood v. Humphrey, 17 Barb. 660. And see Story on Agency, 7th ed., § 6.

[2] As to Texas see Wilson v. Simpson, 4 S. W. Rep. 839.

[3] Coke, 2d Inst. 597; Story on Agency, § 13; 2 Bouv. Inst. *n*, 1300; Emerson v. Providence Hat Mfg. Co., 12 Mass. 241; Lynn v. Burgoyne, 13 B. Mon. 400; Bocock v. Pavey, 8 Ohio St. 270; Gillis v. Bailey, 21 N. H. 149. One having a bare authority coupled with a trust, cannot act by attorney. Black v. Erwin, Harp. (S. C.) 411.

[4] McCormick v. Bush, 38 Tex. 314; Commercial Bank v. Norton, 1 Hill, 505.

of revocation. A person so appointed is the attorney of the principal, and not of the attorney who appointed him.[1]

§ 233. **Who may Act as an Attorney to Execute a Deed.**—Many persons disqualified from acting for themselves, such as infants, aliens, married women and others, may yet act as agents in the execution of a naked authority.[2] The execution of such an authority can be attended with no manner of prejudice to persons under the disability of infancy or coverture, nor to any other persons, who by law may claim any interest under such incapacitated or disabled person after their death.[3] A *feme covert* may even be an attorney for another to make livery to her husband upon a feoffment; and a husband may make such livery to his wife; although they are generally deemed but one person in law.[4] And the wife may also act as the agent or attorney of her husband, with his consent, and, as such attorney, bind him by her acts.[5] But, though she is generally competent to act as the agent or attorney of a third person, it is doubtful whether she can do so against the express dissent of her husband, as such agency may involve duties and services inconsistent with those which appertain to her peculiar relation to her husband and family.[6] Infants of tender years, and persons *non compos mentis*, cannot act

[1] Burrell v. Letson, 1 Strobh. (S. C.) 239. Where an attorney to sell land, with the power of substitution, appointed a substitute, who made sale accordingly, it was held that the former could not recover the money in an action in his own name. Hutchins v. Gilman, 9 N. H. 359. Where M. gave J. a power to sell lands, with power of substitution, J. executed a power to C. to sell the same in J.'s name, and signed it with his own name, not referring to his principal M., C. made a deed as attorney of M. *Held*, invalid, as C. was not appointed M.'s attorney. Stinchcomb v. Marsh, 15 Gratt. (Va.) 202.

[2] Co. Litt. 252; Story on Agency, § 7; Livermore on Agency, 32.

[3] Bacon, Abridg., *Authority*, *B.*

[4] Prestwick v. Marshall, 7 Bing. 565; Hopkins v. Mollinieux, 4 Wend. 465.

[5] Bacon, Abridg., *Authority*, *B.*; Co. Litt. 112; McKinley v. McGregor, 3 Wharf. 369; Felker v. Emerson, 16 Vt. 653; Edgerton v. Thomas, 9 N. Y. 40.

[6] Story on Agency, § 7.

as agents or attorneys, for the reason that they have no discretion or judgment to exercise in favor of others, any more than they have for themselves.[1]

§ 234. **An Authority Conferred upon Several Persons cannot be Executed by a Part of them,** unless the instrument conferring the power shows that such was the intention.[2] But if given to several persons "jointly or severally," either of them can execute the authority. And if given to them, or the survivors or survivor of them, the death of one or more, so long as one remains, will not end the power. But upon the death of one, the trust does not survive to the other, unless such a provision be inserted in the deed.[3] The foregoing rules apply as between private individuals. In matters of public concern it is generally provided that the surviving executor or administrator, when the grant is made to several, may execute the power.

§ 235. **Powers of Attorney are Strictly Construed.**— In construing the authority conferred by a power of attorney, the intentions of the parties are to be regarded.[4] But all powers of attorney receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect; and that authority must be strictly pursued.[5] A party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril. Any act varying from the terms of this power is void.[6] Thus, a power to sell property on a certain day named, gives no authority to sell it on any other day.[7]

[1] Lyon v. Kent, 45 Ala. 656.

[2] Co. Litt. 181 *b*; Green v. Miller, 6 Johns. 39; Franklin v. Osgood, 14 Johns. 553; White v. Davidson, 8 Md. 169; Sinclair v. Jackson, 8 Cowen, 543; Cedar Rapids, etc. R. Co. v. Stewart, 25 Iowa, 115.

[3] Boone v. Clarke, 3 Cranch C C. 389.

[4] Marr v. Given, 23 Me. 55.

[5] Geiger v. Bolles, 1 Thomp. & C. (N. Y.) 129; Brantley v. Southern Life Ins. Co., 53 Ala. 554.

[6] Sanford v. Handy, 23 Wend. 260; Nixon v. Hyserott, 5 Johns. 58.

[7] Bliss v. Clark, 16 Gray, 60.

§ 236. **Authority to Execute a Deed must be Express and Special.**—Thus an agent to "sell" land, has not, as such, power to convey; he may bind his principal to convey, but cannot himself convey, unless authorized by a power of attorney duly executed.[1] So, the general agent of a corporation is not authorized, without a special power, to transfer by deed the real estate of the company.[2] A power given in a power of attorney "to attend to all business affairs appertaining to real or personal estate," was held too indefinite to sustain a transfer of real estate.[3] And a power "to grant any and all discharges by deed or otherwise, both real and personal, as fully as the principal might do," was construed not to enable the agent to convey by deed of warranty the real estate of his principal.[4] But an authority from the directors of a bank to a committee, "to convey land," was held to authorize the agent to execute a deed and affix the corporate seal thereto.[5] And a power to transact all of the constituent's business "of every kind and description, to collect and receipt for all moneys due and owing to him, and to sell and dispose of all his property," was held to authorize the conveyance of the property by deed in trust to secure and pay off certain creditors and sureties of the constituent.[6] So, a power of attorney which authorizes a conveyance to be made "in as full and ample a manner as the principal could execute," authorizes a deed to be made by the attorney with covenants of general warranty.[7] And where a purchaser of land constituted an at-

[1] Force v. Dutcher, 18 N. J. Eq. 401. And see Tharp v. Brenneman, 41 Iowa, 251.

[2] Stow v. Wyse, 7 Conn. 214.

[3] Lord v. Sherman, 2 Cal. 498. Power to attend to the principal's business generally, or "to act for him with reference to all business," does not authorize the agent to sell real estate of his principal, unless necessary and proper to conduct the business to which the agency applies. Coquillard v. French, 19 Ind. 274; Watson v. Hopkins, 27 Tex. 637.

[4] Heath v. Nutter, 50 Me. 378.

[5] Burrill v. Nahant Bank, 2 Metc. 163; Valentine v. Piper, 22 Pick. 85.

[6] Lamy v. Burr, 36 Mo. 85. But see Gimell v. Adams, 11 Humph. (Tenn.) 283.

[7] Taggart v. Stanbery, 2 McLean, 543; Bronson v. Coffin, 118 Mass. 156.

torney to take a conveyance and give a mortgage for the purchase-money, it was held that a power of sale, inserted in the mortgage, was valid, it being the custom, which was known to the purchaser, to insert such a clause.[1] Likewise, power to execute a deed, gives the power by implication to acknowledge it for registration.[2] But as a general rule, where authority to do a specific act is given by power of attorney, and general words are employed, these last are limited to the particular acts authorized.[3]

§ 237. **A Power to Sell Land for a Certain Sum Means for Cash,** unless there is something in the power, or in the usage of trade to vary the legal construction. A power of attorney authorizing the agents "to sell, transfer and convey lands, and to do and perform all acts and deeds for me and in my name concerning any and all property I may now own," does not authorize the agent to barter or exchange the lands for other property.[4] And a power of attorney "to sell and convey" authorizes an absolute sale, but not a gift or transfer for any other purpose.[5] Nor would such a power authorize the attorney to mortgage the property.[6]

§ 238. **How far Necessary that the Power should Identify the Land.**—A power of attorney to sell land must iden-

[1] Wilson v. Troup, 7 Johns. Ch. 25.

[2] Robinson v. Mauldin, 11 Ala. 977.

[3] Billings v. Morrow, 7 Cal. 171; Washburn v. Alden, 5 Cal. 463; Johnson v. Wright, 6 Cal. 373; Reynolds v. Rowley, 4 La. Ann. 396; Boykin v. O'Hara, 6 La. Ann. 115; Lawrence v. Gebhard, 41 Barb. 575; Ferreira v. Depew, 17 How. (N. Y.) Pr. 418; School District v. Ætna Ins. Co., 62 Me. 330; Maynard v. Mercer, 10 Nev. 33; Wicks v. Hatch, 62 N. Y. 535. A power of attorney authorizing the attorney "to buy and sell real estate," to receive and execute all necessary contracts and conveyances therefor, and "to do all things necessary to the transaction of mercantile trading, money loaning and other lawful and proper business:" *Held*, not to authorize the attorney to sell and convey lands to which the principal had acquired title before the execution of the power. Greve v. Coffin, 14 Minn. 345.

[4] Reese v. Medlock, 27 Texas, 120; Lumpkin v. Wilson, 5 Heisk. 555.

[5] Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533.

[6] Bloomer v. Waldron, 3 Hill, 361.

tify it unless it be the only land of the principal.[1] Power to sell all the land of the principal, or all the land owned by him in a particular locality, is sufficient without a particular description of the land.[2] And a letter of attorney, empowering the attorney to sell any of the constituent's real estate, was construed to authorize him to sell real estate which the constituent acquired after the execution of such power.[3] A power authorizing the attorney in fact to sell "the one-half of a lot of land," without specifying which, or whether an undivided half, was held to empower him to sell one-half in severalty, exercising his own discretion as to which half.[4]

§ 239. **Power to Sell Land for Specified Purposes.**— "A power of attorney to sell lands, 'for the purpose of making actual settlements thereon' and 'to sign, seal, and deliver sufficient deeds, conveying the land in fee-simple, with the several covenants of general warranty,' leaves it to the judgment of the attorney to determine whether the purchaser buys for this purpose; and in the absence of fraud, the conveyance will be valid, although the land was purchased, not for settlement, but on speculation."[5]

§ 240. **Relinquishment of Dower by Power of Attorney.**—In several of the States it is provided by statute that: "A married woman may convey her real estate, or relinquish her dower in the real estate of her husband, by a power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband, as deeds conveying real estate by them are required to be executed and acknowledged."[6] In such States where the wife joins

[1] Stafford v. Lick, 13 Cal. 240.

[2] Cassidy v. Carr, 48 Cal. 339.

[3] Fay v. Winchester, 4 Metc. 513. Under a power to convey all the land of the principal which he had not previously conveyed, the agent may convey what his principal had sold, but not conveyed. Mitchelly. Maupin, 3 T. B. Mon. 185.

[4] Alemany v. Daly, 36 Cal. 90.

[5] Spofford v. Hobbs, 29 Me. 148.

[6] Rev. Stats. Mo. 1879, § 670; Rev. Stats. Ill. 1877, Chap. 30, § 17; Stimson's Amer. Stat. § 6506.

with her husband in executing a power to convey his land, she to relinquish her dower, authority to relinquish her dower should be conferred on the attorney in the body of the instrument, and the certificate of acknowledgment, where required, should show that, on a private examination, she acknowledged that she executed such power for the purpose of authorizing the attorney to relinquish her dower, instead of stating that "she relinquished her dower," as is frequently done where this form of acknowledgment is in use. The propriety, if not vital importance, of following this suggestion is apparent when we consider that no title passes to the attorney, and that, therefore, the dower cannot be released to him, but that the power can only authorize him to release it.

§ 241. **A Power of Attorney may be Revoked, when.**—A power of attorney to sell land may be revoked by the principal at any time before sale, unless given for a valuable consideration, or coupled with an interest.[1] But every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument itself.[2] The power of sale in a mortgage is a part of the security, and affords an instance of irrevocable powers. Simple powers of attorney to convey land are usually but naked powers, and transfer no interest to the attorney.

§ 242. **Of the Revocation of a Power.**—When a power of attorney has been recorded, an instrument revoking it should be executed with the same formalities and recorded in the same office in which the instrument containing the power is recorded. Notice, or a copy of the instrument of revocation should also be served on the attorney.[3] There are also other acts and circumstances which will put an end to the authority conferred by a power of attorney. It must be executed during the life of the party creating it, or his death terminates the power.[4] So, the after-occurring in-

[1] Brown v. Pforr, 38 Cal. 550; Hartley's Appeal, 53 Pa. St. 212.

[2] Story on Agency, § 477.

[3] Weile v. United States, 7 Ct. of Cl. 535.

[4] Bac. Abr. Tit. *Authority*, E.

sanity of a principal operates, *per se*, as a revocation or suspension of the powers of his agent.[1] And if an unmarried woman executes a power of attorney as principal and afterwards marries, her marriage, *ipso facto*, amounts to a revocation of the power;[2] for a married woman, in general, has no right to authorize an attorney to do any act in her name, or to dispose of any of the property.[3] But these apply only to naked powers. A power coupled with an interest is not revoked by the death, insanity, or marriage of the principal.[4]

ARTICLE VII.

OF THE EXECUTION OF DEEDS BY ATTORNEY.

SECTION.

245. The power must be strictly pursued.
246. The form in which the agent should execute his authority.

§ 245. **The Power must be Strictly Pursued.**—Powers of attorney, as we have seen, are rigidly interpreted, and must be strictly pursued in their execution. The effect of a written authority in limiting the power of an attorney precisely within what is written, cannot be better illustrated than by a reference to a few of the adjudged cases. In the first place, it may be observed, that when a grantor requests a person to sign his name to a deed for him, and the person so requested writes the name of the grantor in his presence and by his direction, without writing his own name or adding any words to indicate that the grantor acted by attorney, this would nevertheless be the signature of the

[1] Matthiessen & W. R. Co. v. McMahon, 38 N. J. L. 537.
[2] Henderson v. Ford, 46 Texas, 627.
[3] Story on Agency, § 481.
[4] Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Clayton v. Merrett, 52 Miss. 353; Henderson v. Ford, 46 Texas, 627.

grantor, since it would be regarded as his personal act.[1] But, if the grantor has given to A. a power of attorney in the ordinary form, authorizing him to execute a deed for him as his attorney, and A. writes the name of the grantor to the deed in his absence without saying *by A., his attorney*, or writing his own name, this would not seem to be a sufficient execution of the deed,[2]—the reason assigned in the latter instance being, that A. had no other power to act for the grantor than that which the letter of attorney gave him; and that did not give him any other power than to act as the grantor's attorney, that is, to sign the deed himself, declaring that the grantor signed it by him.[3] In

[1] Ball v. Duntersville, 4 Term Rep. 313; Lovelace's Case, W. Jones, 268; Gardner v. Gardner, 5 Cush. 483; Hibblewhite v. McMorine, 6 M. & W. 200; King v. Longnor, 4 B. & Ad. 647; Frost v. Deering, 21 Me. 156; Videau v. Griffin, 21 Cal. 392; Burns v. Lynde, 6 Allen, 309, 310; Kime v. Brooks, 9 Ired. 219; McMurtry v. Brown, 6 Neb. 368.

[2] Wood v. Goodridge, 6 Cush. 117; Stackpole v. Arnold, 11 Mass. 27; 2 Dixon on Title Deeds, 533. But see *contra*, Devinney v. Reynolds, 1 Watts & S. 328.

[3] The court, in Wood v. Goodridge, 6 Cush. 117, argue that "if the agent might execute instruments in this mode" (by signing the name of the principal as if signed by him in person), "the principal, if he found his name signed to an instrument, would have no means of knowing by whom it had been signed, or whether he was bound or not bound by such a signature; and other persons might be greatly deceived and defrauded, by relying upon such signature as the personal act and signature of the principal, when the events might prove, that it was put there by an agent who had mistaken his authority, and consequently that the principal was not bound. When it should be discovered that the name of the principal was not written by him, as it purports to be, it might be wholly impossible to prove the execution by attorney, as there would be nothing to indicate such an execution." But in Forsyth v. Day, 41 Me. 382, the court says: "No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned judge in the case of Wood v. Goodridge. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him, and bind him, he may not authorize him thus to act for him and bind him in one name as well as in another. As a matter of convenience in preserving testimony, it may be well that the names of all parties, who are in any way connected with a written instrument, should appear upon the instruments themselves. But the fact that the name of the agent, by whom the signature of the

the first case the grantor being present and authorizing the signature makes it theoretically his own.[1] But in the execution of a deed by attorney the disposing power is delegated to the attorney, and the deed takes effect from his act; therefore the power is to be strictly examined and construed;[2] and any act varying from the terms of the power is void.

§ 246. **The Form in which the Agent should Execute his Authority.**—There is much discussion in the books as to the form in which an agent should execute his authority, so as to bind his principal, and not bind himself.[3] The rule commonly laid down by the authorities, in respect to the execution of solemn instruments under seal, is that, to bind the principal, the instrument must purport on its face to be the deed of the principal, and his name must be inserted in it, and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument; or at least the terms of the instrument should clearly

principal is affixed to an instrument, appears upon the instrument itself, neither proves, nor has any tendency to prove, the authority of such agent." And see Merrifield v. Parritt, 11 Cush. 590; Hunter v. Giddings, 97 Mass. 41; First National Bank v. Gay, 63 Mo. 34. In these cases, however, the instruments in question were simple instruments of writing not under seal; while the case of Wood v. Goodridge involved the question also of the execution of a mortgage under seal. So far as it relates to the execution of a deed, there does not seem to be any authority in direct conflict with the latter case. In Devinney v. Reynolds, 1 Watts & S. 328, a contrary doctrine is announced; but in that case, although the signature was merely that of the principal, the body of the deed and testimonium clause showed that it was executed by the attorney, his name being mentioned. Story, in his work on Agency, says, in reference to the execution held necessary, in the case of Wood v. Goodridge: "The propriety of such a mode of execution may be easily seen, but it cannot positively be said, upon the authorities, to be absolutely necessary to the validity of the instrument." Story on Agency, 7th ed., § 147.

[1] And where a wife, in the absence of her husband, signed his name to a deed, and he afterwards acknowledged the deed before a magistrate as his free act and deed, it ratified and made valid his signature. Bartlett v. Drake, 100 Mass. 175.

[2] Gardner v. Gardner, 5 Cush. 483.

[3] As to statutory requirements, see Stimson's Amer. Stat. § 1675.

show that the principal is intended to be positively bound thereby, and that the agent acts merely as his agent in executing it.[1] Thus, if a person authorized by power of attorney to make a conveyance under seal, of lands of his principal makes a conveyance by a deed in his own name, it will not bind the principal; and it will make no difference in the case, that, in the deed, he describes himself as the agent of the principal, as if the deed should read: "This deed, made and entered into by and between A. B., as agent of C. D.," etc., or if he signed it "A. B. for C. D.;" for in such a case it is still his own deed, and not the deed of his principal.[2] Though, if the attorney had authority, it will be sustained in equity as an agreement of the principal to convey, and will be good against subsequent purchasers with notice.[3] But the authorities upon the former proposition are by no means uniform, and in some States, the subject has been regulated by statute.[4] In *Jones* v. *Carter*,[5] the court held, that where a deed was signed

[1] Stackpole v. Arnold, 11 Mass. 27, 29; Wood v. Goodridge, 6 Cush. 117, 120; Bedford Com. Ins. Co. v. Covell, 8 Mete. 442; Bradlee v. Boston Glass Manufactory, 16 Pick. 347; Arfridson v. Ladd, 12 Mass. 174; Savage v. Rix, 9 N. H. 263, 269; Rice v. Gove, 22 Pick. 158; Minard v. Mead, 7 Wend. 68; Pentz v. Stanton, 10 Wend. 271; Spencer v. Field, *Id.* 87; Bassett v. Hawk, 114 Pa. St. 502; Caddell v. Allen (N. C.), 6 S. E. Rep. 399. For a collection of cases upon this subject, see 1 Am. Lead Cas. 577 *et seq.* A deed under power of attorney is properly executed at common law, in the name of the principal by his attorney, and that form is still valid notwithstanding Md. Acts 1856, ch. 154, § 23, providing that the agent shall sign the deed as agent or attorney. Posner v. Bayless, 59 Mo. 56.

[2] Bac. Abridg., *Leases*, 1 § 10; Com. Dig., *Attorney*, C. 14; Paley on Agency, Lloyd's ed., 181, 183; Story on Agency, § 148; Martin v. Flowers, 8 Leigh (Va.), 158; Townsend v. Hubbard, 4 Hill, 351; Clarke v. Courtney, 5 Pet. 349, 351; Brinley v. Mann, 2 Cush. 337.

[3] Love v. Sierra Nevada, etc. Mining Co., 32 Cal. 639; 1 Am. Lead. Cas. 585. See Wilkinson v. Getty, 13 Iowa, 157; Yerby v. Grigsby, 9 Leigh (Va.), 387; McNaughton v. Partridge, 11 Ohio, 223.

[4] The Statute of Maine of 1823, Ch. 220 (Vol. 3, p. 49), provides that deeds made by an agent, in his own name, shall be valid, provided the agent had authority, and it appears on the face of the deed that he meant to execute the authority.

[5] 4 Hen. & M. 196. And see Wilkes v. Bock, 2 East, 142.

"B. W., attorney for R. C.," it was clearly a good execution of the deed. But in *Thurman* v. *Cameron*,[1] the court held that the attorney must use the name of the principal both in the body of the deed and by way of signature. So where a deed recited the power of attorney, and followed with "J. S. by virtue of the power aforesaid, hereby grants," etc., with a testatum: "In witness whereof, I have hereunto set the name and seal of the principal"—and was signed "J. S." with a seal, it was held not to be the deed of the principal.[2] Though in *Devinney* v. *Reynolds*,[3] where the deed itself stated that it was executed by the grantor, "by his attorney W. M." and was signed H. M. (the principal's name), it was held a good execution. Many nice distinctions and seeming conflicts of opinion have arisen, which it would probably be useless to attempt to harmonize into any settled doctrine; but as a general rule, if it appears clearly from any part of the instrument that it is the deed of the principal, that he makes the grants and covenants, and that the seal is his, and that his signature is attached thereto by the attorney named, the precise form or arrangement of words will not be material.[4] As to the proper form for the acknowledgment of a deed executed by attorney in fact, the reader is referred to a future chapter.[5]

[1] 24 Wend. 90.

[2] Elwell v. Shaw, 16 Mass. 42; Barger v. Miller, 4 Wash. C. C. 280; Harper v. Hampton, 1 Harr. & J. 709. See Echols v. Cheney, 28 Cal. 160; Townsend v. Corning, 23 Wend. 438.

[3] 1 Watts. & S. 328.

[4] Pars. on Contracts, 54.

[5] Chapter IV., Art. I. § 253.

CHAPTER IV. — Acknowledgment and Registration of Deeds.

Article I. Acknowledgment or Proof of Deeds.
II. Of the Registration of Deeds.

ARTICLE I.

ACKNOWLEDGMENT OR PROOF OF DEEDS.

SECTION.
248. The provisions regulating acknowledgments purely statutory.
549. When a certificate of acknowledgment is necessary.
250. The purposes of the acknowledgment.
251. Effect of the acknowledgment upon the deed as evidence.
252. The acknowledgment authorizes and gives effect to the record.
253. Who may make the acknowledgment.
254. It is immaterial when the acknowledgment is made.
255. What law governs.
256. Qualification of the officer to act in taking the acknowledgment.
257. As to the date and place of taking the acknowledgment.
258. The certificate should set out the official character of the officer.
259. The name of the grantor should be stated or referred to.
260. Statutory requirements must be substantially complied with.
261. The certificates must be subscribed—seal of office.
262. The certificate to be on the same sheet with the deed, when.
263. The certificate how far conclusive of the facts stated.
264. Mistakes in the certificate may be corrected, how.
265. Curative statutes.
266. Proof by subscribing witnesses.

§ 248. **The Provisions Regulating Acknowledgments Purely Statutory.**—The practice of acknowledging deeds,

which has been adopted in all of our States as a means of proving their execution and to prevent frauds and impositions, was unknown to the common law. The provisions regulating the same are purely statutory. Each State prescribes by statute the forms to be observed in taking and certifying the acknowledgment, or proof of deeds of land situated within its limits, and designates what officers may take the same. No provision in respect thereto, adopted in one State, has any effect upon a conveyance of land situated in another State, except where it is provided that deeds executed in other States may be executed, acknowledged, or proved in accordance with the laws of the State where executed. It is not our purpose to attempt here to review the legislation of the several States upon this subject, but simply to present a very general outline of the usual requirements of such statutes, and to notice some of the questions that have arisen from time to time in respect to the same. For the special requisites of the certificate, and to ascertain what officer may take and certify an acknowledgment in any given case, the reader must, of course, refer to the statute of the State in which the land is situated, in force at the date of the taking of such acknowledgment.[1]

§ 249. **How far Essential to the Valid Execution of a Deed.**—In some of the States, it has been held that a deed must be acknowledged, and the acknowledgment certified thereon, in order to its operating to pass title.[2] But, generally speaking, a deed is valid as between the parties, though not acknowledged or recorded.[3] And yet, in several

[1] See Stimson's Amer. Stat., §§ 1570, 1585.

[2] Smith v. Hunt, 13 Ohio, 260, 268; Hout v. Hout, 20 Ohio St. 119. A deed in Alabama, without any subscribing witness, and without acknowledgment before a proper officer, is inoperative as a conveyance of land. Lord v. Follar, 57 Ala. 615; Bank of Kentucky v. Jones, 59 Ala. 123.

[3] Hastings v. Vaughn, 5 Cal. 315; Goodenough v. Warren, 5 Sawyer, 494; Strong v. Smith, 3 McLean, 362; Stevenson v. Cloud, 5 Blackf. 92; Simson v. Mundee, 3 Kan. 172; Webster v. Hall, 2 Har. & M. 19; Dole v. Thurlow, 12 Metc. 157; Brown v. Manter, 22 N. H. 468; Wark v. Willard, 13 N. H. 389; Gibbs v. Swift, 12 Cush. 393; Jackson v. Allen, 30 Ark. 110; Hill v. Samuel, 21 Miss. 307; McMahon v. McGraw, 26 Wis.

of the States where this is true, the certificate of acknowledgment is an essential part of the due execution of the deed of a *feme covert*, and unless there is a substantial compliance with the statute, no title passes.[1]

§ 250. **The Purpose of the Acknowledgment of a Deed,** as a general rule, is to prove its execution. (1) In order that it may be used in evidence. (2) That it may be entered of record.

§ 251. **Effect of the Acknowledgment upon the Deed as Evidence.**—In many of the States, a deed that has been duly acknowledged and recorded may be used in evidence

614; Stewart v. Mathews, 19 Fla. 752; New Hampshire Land Co. v. Tilton, 19 Fed. Rep. 73. The acknowledgment has reference to the proof of execution simply, and not to the force of the instrument. Gray v. Ulrich, 8 Kan. 112. A deed, not acknowledged or recorded, is no evidence of seizin or possession in the grantee, except as against the grantor and his heirs. Kellogg v. Loomis, 16 Gray, 48. Although a deed is defectively acknowledged, or even not acknowledged at all, it is good as between the parties, and subsequent purchasers from the grantor with actual notice. Stevens v. Hampton, 46 Mo. 404. But not good as to subsequent purchasers in good faith, and for a valuable consideration. Bishop v. Schneider, 46 Mo. 472; Ryan v. Carr, 46 Mo. 483; Blain v. Stewart, 2 Iowa, 383; Mastin v. Halley, 61 Mo. 196; Lake v. Gray, 30 Iowa, 415; *s. c.*, 35 Iowa, 459; Ricks v. Reed, 19 Cal. 571; Fryer v. Rockefeller, 63 N. Y. 208.

[1] Mariner v. Saunders, 10 Ill. 113; Mason v. Brock, 12 Ill. 273; Bruce v. Perry, 11 Rich. 121; Franklin v. Becker, 11 Bush (Ky.), 595; McCormack v. Woods, 14 *Id.* 78; McBryde v. Wilkinson, 29 Ala. 662; Perdue v. Aldridge, 19 Ind. 290; Armstrong v. Ross, 20 N. J. Eq. 109; Goodenough v. Warren, 5 Sawyer, 494. The essential thing to be accomplished in effecting a conveyance by a *feme covert*, is the privy examination, whereby it is ascertained that her execution of the instrument was voluntary, free and without fear, compulsion or undue influence. Whatever statutory provisions have reference to the accomplishment of that object, and the protection of the *feme covert*, must be considered as mandatory. Mount v. Kesterson, 6 Coldw. (Tenn.), 452. See Woodbourne v. Gorrel, 66 N. C. 82; Becker v. Quigg, 54 Ill. 390. Where the word "voluntary" is omitted in the certificate of the privy examination of a married woman, the deed conveys no title. Laird v. Scott, 5 Heisk. (Tenn.) 314. The rule that, in taking the acknowledgment of a deed, a substantial compliance with the statute is sufficient, applies equally to acknowledgments by married women. Tubbs v. Gatewood, 26 Ark. 128.

without further proof of its execution.[1] And it is believed that, according to the practice in most of the States, a deed that has been acknowledged in the manner provided by law is entitled to be received in evidence, though it never has been recorded.[2] In some of the States a deed, defective as to the acknowledgment, so as not to be entitled to registration, but which has been recorded, may be allowed in evidence, with instructions to the jury as to its effect in giving notice.[3] But in New York, a deed duly executed and acknowledged, but not in the manner provided by statute, in order that it might be recorded, was held not admissible in evidence without proof of its execution.[4] So, also, in Indiana.[5] And in some of the States, it seems, that a deed, although acknowledged and recorded, must be proved as at common law, in order to be used by the holder in evidence in questions involving the validity of the deed.[6] It may be added that as against the grantor and his heirs, a deed may be introduced in evidence without acknowledgment.[7]

§ 252. **The Acknowledgment Authorizes and Gives Effect to the Record.**—A deed which is not acknowledged is not, as a general rule, entitled to be recorded, and although it has been placed upon record, is no notice to third parties,

[1] Carpenter v. Dexter, 8 Wall. 532; Reed v. Kemp, 16 Ill. 445; Simpson v. Mundee, 3 Kas. 181; Clark v. Troy, 20 Cal. 219; Ward v. Fuller, 15 Pick. 185; Hinchliff v. Hinman, 18 Wis. 135; Landers v. Bolton, 26 Cal. 405; Hutchison v. Rust, 2 Gratt. 394; Samuels v. Borrowscale, 104 Mass. 207.

[2] Keichline v. Keichline, 54 Pa. St. 75. See Granniss v. Irwin, 39 Ga. 22.

[3] Hastings v. Vaughn, 5 Cal. 315. And if there be no acknowledgment, it may be admitted on proof of its execution. In Blair v. Valliant, 4 Har. & M. 62, a deed was admitted in evidence, in an action of trespass, though it appeared by the acknowledgment that the grantor did not acknowledge it to be his free act and deed.

[4] Jackson v. Shepard, 2 Johns. 77.

[5] Strong v. Smith, 3 McLean, 362.

[6] 3 Washb. on Real Prop., 4th ed., 322; 2 Greenl. on Ev., § 299.

[7] Brown v. Manter, 22 N. H. 468; Wark v. Willard, 13 N. H. 389; Gibbs v. Swift, 12 Cush. 393; *ante*, § 249.

and is a nullity as to all the benefits conferred by statute upon properly registered instruments.[1] But, in some of the States, the record of a deed that has neither been acknowledged or proved, will operate as constructive notice of the contents of the instrument.[2] And where a deed not entitled to record, but which has been recorded, does not operate as constructive notice, it may operate as actual notice.[3] The subject of notice will be further considered under the head of Registration.[4]

§ 253. **Who may Make the Acknowledgment.**—Of course the only parties required to make an acknowledgment, or that would be competent to acknowledge a deed, are those who make or join in the grant. Where a deed is executed by an attorney in fact, the proper mode is for the attorney to acknowledge that he executed the same as the act and deed of his principal.[5] In the case of a corporation, the deed may be acknowledged by any one of the officers thereof lawfully authorized to do so.[6] In some of the States there is a provision of statute to that effect.[7] Where there

[1] Story's Eq. Jur., § 404; Strong v. Smith, 3 McLean, 362; Lewis v. Baird, *Id.* 56; Graves v. Graves, 6 Gray, 391; Kerns v. Swope, 2 Watts, 75; Shaw v. Poor, 6 Pick. 88; Shults v. Moore, 1 McLean, 520; Heister v. Fortner, 2 Binn. 40; Cheney v. Watkins, 1 Har. & J. 527; Tillman v. Cowand, 12 Smed. & M. 262; Blood v. Blood, 23 Pick. 80; Isham v. Bennington Co., 19 Vt. 230; Herndon v. Kimball, 7 Ga. 432; DeWitt v. Moulton, 17 Me. 418; Carter v. Champion, 8 Conn. 549; Harper v. Barsh, 10 Rich. Eq. 149; Peck v. Mallams, 10 N. Y. 518; Burnham v. Chandler, 10 Tex. 441; Dussaume v. Burnett, 5 Iowa, 95; Galpin v. Abbott, 6 Mich. 17; Bossard v. White, 9 Rich. Eq. 483; McKean v. Mitchell, 35 Pa. St. 269; Ely v. Wilcox, 20 Wis. 529; Bishop v. Schneider, 46 Mo. 472; Stevens v. Hampton, *Id.* 404; Fleming v. Ervin, 6 W. Va. 15; Pringle v. Dunn, 37 Wis. 449; Bass v. Estill, 50 Miss. 300; Carpenter v. Dexter, 8 Wall. 532; Brydon v. Campbell, 40 Md. 331.

[2] Simpson v. Mundee, 3 Kan. 181; Reed v. Kemp, 16 Ill. 445.

[3] Musgrove v. Bonser, 4 Oreg. 313; Bass v. Estill, 50 Miss. 300; Manandas v. Mann (Oreg.), 13 Pac. Rep. 449.

[4] *Post*, Art. II.

[5] Coombe's Case, 9 Co. R. 76 *b*; Fowler v. Shearer, 7 Mass. 19; Elwell v. Shaw, 16 Mass. 42.

[6] Merrill v. Montgomery, 25 Mich. 73; Phillips v. Coffee, 17 Ill. 154; Sawyer v. Cox, 63 Ill. 133; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.

[7] Muller v. Boone, 63 Tex. 91.

is no statute prescribing a particular mode of acknowledging deeds by a corporation, the officer affixing the corporate seal is the proper person to make the acknowledgment.[1] A deed to the wife's land must be acknowledged by both husband and wife in the manner required by statute.[2]

§ 254. **When the Acknowledgment may be Made.**— Where no period is designated by statute, it is immaterial when the acknowledgment of an instrument is made. If done when offered in evidence, it may be read;[3] even though acknowledged after suit is brought.[4] But the subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee will not relate back to the signing and delivery of a deed, so as to prejudice the rights of execution creditors.[5] Though, it has been held that, where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with intent to cure the defect; and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance.[6]

§ 255. **What Law Governs.**—We have already stated that the acknowledgment of a deed must be taken and certified in accordance with the laws of the State where the land is situated, in force at the time of taking and certifying the same.[7] In some of the States, the law provides that this may be done in conformity with the law of the State where taken. In which case a party maintaining the validity of an acknowledgment, who rests on the law of one State,

[1] Kelly v. Calhoun, 95 U. S. 710.

[2] Southerland v. Hunter, 93 N. C. 310; Ferguson v. Kingsland, *Id.* 337.

[3] Pierce v. Brown, 24 Vt. 165; Johnson v. McGehee, 1 Ala. 186. It is no substantial objection to a deed, that the acknowledgment bears date prior to the deed. Gest v. Flock, 2 N. J. Eq. 108. Husband and wife may acknowledge a deed at different times and places and before a different officer. Ludlow v. O'Neil, 29 Ohio St. 181.

[4] Kelly v. Dunlap, 3 Pa. 136.

[5] Hendon v. White, 52 Ala. 597.

[6] Cahall v. Citizens Mut. Assn., 61 Ala. 233.

[7] *Ante*, § 248; Brannon v. Brannon, 2 Disney (Ohio), 224; Keller v. Moore, 51 Ala. 340.

must show a compliance therewith in all essential particulars; he cannot rely partly on one law and partly on the other.[1]

§ 256. **As to the Qualification of the Officer Taking an Acknowledgment.**—The acknowledgment of a deed before a *de facto* officer is sufficient.[2] It cannot be attacked collaterally.[3] The general rule, irrespective of statutory provisions, is that an officer cannot take the acknowledgment of a deed to which he is a party, or in which he is directly or indirectly interested, and the record of such a deed will not operate as constructive notice to a subsequent purchaser,[4] yet the deed would be good as between the parties.[5] It is no objection to an acknowledgment that the officer taking it stands in so near a relation to the party making it, as to render him incompetent to act in a judicial capacity;[6] the question seems to depend on whether the officer

[1] Adams v. Bishop, 19 Ill. 395; Montag v. Linn, *Id.* 399.

[2] Brown v. Lunt, 37 Me. 423; Prescott v. Hayes, 42 N. H. 56; Bullene v. Garrison, 1 Wash. 587. The acknowledgment of a deed before a *de facto* clerk of a court is sufficient, although the clerk, in his certificate, describes himself as clerk *pro tempore*. Woodruff v. McHarry, 56 Ill. 218. Where by a clear clerical error the officer taking the acknowledgment in another State is made to appear to have no commission the deed will not be invalid. Quimby v. Boyd, 8 Colo. 194.

[3] Prescott v. Hayes, 42 N. H. 56; Hamilton v. Pitcher, 53 Mo. 334.

[4] Wilson v. Traer, 20 Iowa, 231; Groesbeck v. Seeley, 13 Mich. 329; Brown v. Moore, 38 Tex. 645; Wasson v. Connor, 54 Miss. 352; Beaman v. Whitney, 20 Me. 413; Withers v. Baird, 7 Watts, 227; Green v. Abraham, 43 Ark. 420; Hogans v. Caruth, 18 Fla. 587. The acknowledgment of a deed of trust taken by one of the trustees is void as to such trustee. Bennett v. Shepley, 82 Mo. 468. But if the execution of the deed is proved, this will cure the defect. Darst v. Gale, 83 Ill. 136. And see Nat. Bank v. Conway, 14 Bankr. Reg. 513, where it was held that the fact that the notary is interested under a deed of trust as one of the beneficiaries, does not disqualify him from taking and certifying the grantor's acknowledgment of the deed. See Gibson v. Norway Bank, 69 Me. 579. An individual owning an interest in a tract of land is not so far interested in the entire land as to prevent him from taking the acknowledgment of a deed conveying another and distinct interest in it. Dussaume v. Burnett, 5 Iowa, 95.

[5] Dussaume v. Burnett, 5 Iowa, 103; Caldwell v. Head, 17 Mo. 561; Hampton v. Stevens, 10 Amer. Law Reg. (N. S.) 107; Beaman v. Whitney, 20 Me. 413.

[6] The act of taking the acknowledgment is ministerial. Lynch v. Liv-

is a party to the deed.[1] Nor does the right of the officer to take the acknowledgment depend on the length of his acquaintance with the person, or the manner in which his knowledge is acquired. These are necessarily questions for the conscience of the officer, and the means through which he obtains knowledge of the person's identity are not material, provided the fact of his acquaintance is stated in the certificate.[2] It may be added that, as a general rule, whenever an officer is authorized to have a deputy, such deputy may take and certify acknowledgments in the name of his principal;[3] and in some States he may do this in his own name.[4] Numerous questions have arisen from time to time, in each of the States, as to what officers have, under the

ingston, 6 N. Y. 422; Kimball v. Johnson, 14 Wis. 674; Hill v. Bacon, 43 Ill. 477. But it seems that in some of the States, the officer taking the acknowledgment acts, at least, in a *quasi* judicial capacity. The Supreme Court of Mississippi, in a late case, said: "Whatever may be said of the receiving for record and recording of a deed, it is evident that the taking of an acknowledgment of a grantor is a *quasi* judicial act and cannot be performed by the grantee in the deed. The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance, actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument. By his certificate he makes an official record of his adjudication on these points, which cannot be impeached by himself, and sometimes cannot be impeached by the grantor." Wasson v. Connor, 54 Miss. 352.

[1] Groesbeck v. Seely, 13 Mich. 329; Wilson v. Traer, 20 Iowa, 231. An attesting witness may take the acknowledgment. Baird v. Evans, 58 Ga. 350

[2] Wood v. Bach, 54 Barb. 134.

[3] Muller v. Boggs, 25 Cal. 175; Hope v. Sawyer, 14 Ill. 254; Abrams v. Ervin, 9 Iowa, 87; Gibbons v. Gentry, 20 Mo. 468; Lynch v. Livingston, 8 Barb. 463; Kemp v. Porter, 7 Ala. 138. Where a deputy takes acknowledgment of a deed and indorses a memorandum thereof on such deed, but fails to write out and sign the certificate thereof, the clerk or another deputy may write and sign the certificate, setting forth in such certificate the facts as provided in the statute. Drye v. Cook, 14 Bush (Ky.), 459.

[4] Touchard v. Crow, 20 Cal. 150; McCraven v. McGuire, 23 Miss. 100; Beaumont v. Yeatman, 8 Humph. (Tenn.) 543; Cook v. Knott, 28 Tex. 85; Babbitt v. Johnson, 15 Kan. 252.

statutes providing for acknowledgments, the power to take and certify the same. The cases upon this subject are very numerous; and as such questions always depend more or less upon the construction of a local statute, it would be of little service to note them here.

§ 257. **As to the Date and Place of Taking the Acknowledgment.**—In some of the States it seems not to be indispensably necessary that the place of taking the acknowledgment should appear from the certificate, if it appears with sufficient certainty from an inspection of the whole instrument.[1] And the want of a date will not vitiate the certificate.[2] Where no time or place appears in the certificate, in the absence of proof to the contrary, the date of the deed and the county in which the magistrate has jurisdiction, are presumed to be the time and place of the acknowledgment.[3] But in Iowa, a certificate of acknowledgment, which failed to show the county of the notary, was held to be fatally defective; and it was further held that the impression of the notary's seal, upon which the name of the county was engraved, did not cure the defect.[4] And a similar doctrine was announced in an early case in Illinois.[5] But an acknowledgment which omits the name of the county in the

[1] Brooks v. Chaplin, 3 Vt. 281. And see Carpenter v. Dexter, 8 Wall. 513.

[2] Irving v. Brownell, 11 Ill. 402; Trulock v. Peeples, 1 Ga. 3. Where a deed has been recorded within the time prescribed by law, and the year when it was acknowledged is omitted in the acknowledgment, the legal inference is that it was legally acknowledged. Wickes v. Caulk, 5 Har. & J. (Md.) 36.

[3] Rackleff v. Norton, 19 Me. 274; Trulock v. Peeples, 1 Ga. 3. The acknowledgment of a sheriff's deed is good, which states "on the——day before the judge of the Circuit Court, within and for the——county aforesaid, in court judicially sitting, appeared," etc. Huxley v. Harrold, 62 Mo. 516. And see Sidwell v. Birney, 69 Mo. 146.

[4] Willard v. Cramer, 36 Iowa, 22.

[5] Vance v. Schuyler, 6 Ill. 160. The venue of a certificate simply "County of New York," with no indication of the State in the body of the deed, held insufficient. Hardin v. Kirk, 49 Ill. 153. Yet the defect is cured by the certificate of the county clerk that the commissioner was duly commissioned for the city, county and State of New York, residing in the county and duly authorized. Hardin v. Osborne, 60 Ill. 93.

caption is merely informal, and may be held sufficient.[1] Where a conveyance is acknowledged before an officer authorized to take the same within the limits of his jurisdiction, it will be presumed that the acknowledgment was actually taken within such limits, without an averment of that fact contained in the certificate.[2] An acknowledgment may be taken by a notary public, anywhere within the limits of the county.[3] In Arkansas, it seems that the acknowledgment of a deed before a judge or justice of the peace, taken within the limits of the State in which he is commissioned to act, is valid.[4]

§ 258. **The Official Character of the Officer should Appear from the Certificate.**—In general, if the person taking an acknowledgment gives himself no official character, either in his certificate or subscription, it is insufficient, and the record irregular and inoperative.[5] Though, in the cases cited it was held that the official character of such person might be proved by evidence *aliunde*.[6]

§ 259. **The Name of the Grantor should be Stated or Referred to.**—Although the name of the grantor is defect-

[1] Chiniqua v. Catholic Bishop of Chicago, 41 Ill. 149; Graham v. Anderson, 47 *Id.* 514.

[2] Bradley v. West, 60 Mo. 33; Morrison v. White, 16 La. Ann. 100; Dunlap v. Daugherty, 20 Ill. 397.

[3] Hill v. Bacon, 43 Ill. 477; Utica & Black River R. R. Co. v. Stewart, 33 How. (N. Y.) Pr. 312.

[4] Biscoe v. Byrd, 15 Ark. 655.

[5] Johnson v. Haines, 2 Ohio, 278; and the fact that such person was qualified to take acknowledgments cannot be provided by parol. In Final v. Backus, 18 Mich. 218, a deed purporting to be executed in New York, in which the letters "J. P." were the only designation of the official character of the person taking the acknowledgment, but certified in the manner required by statute to entitle it to record, the certificate of the officer who certified to the due execution of the deed explaining the meaning of the abbreviation by attesting the official character of the person, was held sufficient to admit the deed in evidence. And see Sparrow v. Hovey, 41 Mich. 708.

[6] Shultz v. Moore, 1 McLean, 520; Bennett v. Paine, 7 Watts, 334; Scott v. Gallagher, 11 Serg. & R. 347. Certificate wherein officer styles himself such is *prima facie* evidence of the fact. Tuten v. Gogan, 18 Fla. 751. See Van Ness v. Bank United States, 13 Pet. 17.

ively stated in the certificate, yet if it appear from the whole instrument, with reasonable certainty, that it was acknowledged by him, it is sufficient.[1] A certificate that A. acknowledged the deed, when A. was the grantee and B. the grantor, was held to be a fatal error.[2] But where the certificate was "T. G.," when the grantor's name was "T. G. S.," it was held by the court that such reference might construe and correct the certificate.[3] And a certificate that a deed was "signed, sealed and acknowledged," was held good though it did not mention the name of the grantor.[4] The body of the deed may be referred to, to support the certificate.[5] But in Ohio, a certificate which made no reference to the deed, and did not show by whom it was acknowledged, was held void.[6] And in Pennsylvania a mortgage deed wherein the certificate failed to state by whom the acknowledgment was made, was held not entitled to be recorded.[7]

§ 260. **Statutory Requirements must be Substantially Complied with.**—The certificate of the acknowledgment should show affirmatively that the requirements of the statute in respect to the same have been substantially complied with.[8] It is not sufficient that the officer certify that

[1] Wilcoxsen v. Osborn, 77 Mo. 621.

[2] Wood v. Cochrane, 39 Vt. 544; Magness v. Arnold, 31 Ark. 103.

[3] Chandler v. Spear, 22 Vt. 388. The acknowledgment of a deed by a trustee, who signed the instrument as trustee, is not void because the certificate describes him simply by his individual name, without adding his title. Dail v. Moore, 51 Mo. 589.

[4] Wise v. Postlewaite, 3 W. Va. 452.

[5] Bradford v. Dawson, 2 Ala. 203; Carpenter v. Dexter, 8 Wall. 513; Kelly v. Rosenstock, 45 Md. 389. And see Sharpe v. Orme, 61 Ala. 263. A probate, omitting the name of the grantee and the quantity of land, is good if indorsed on the deed itself. Love v. Shields, 3 Yerg. (Tenn.) 405.

[6] Smith v. Hunt, 13 Ohio. 260. Where a deed was acknowledged in open court, a certificate that it was acknowledged, without saying by whom, was held sufficient. Phillips v. Ruble, Litt. (Ky.) Sel. Cas. 221.

[7] Meyers v. Boyd, 96 Pa. St. 427.

[8] Jacoway v. Gault, 20 Ark. 190; Fipps v. McGehee, 5 Porter (Ala.), 413; Bryan v. Ramirez, 8 Cal. 461; Carpenter v. Dexter, 8 Wall. 513; Smith v. Garden, 28 Wis. 685; Calumet, etc. Co. v. Russell, 68 Ill. 426; Sharpe v. Orme, 61 Ala. 263; Myers v. Boyd, 96 Pa. St. 427; Talbert v.

the acknowledgment was "according to law;" he should state the facts in regard to the acts and declarations of the party.[1] Though the acknowledgmeat need not be in the exact words of the statute; words of equivalent import are sufficient.[2] Where, instead of certifying that the party had executed the deed, the words "signed, sealed and delivered the same," were used, it was held sufficient.[3] So, the omission of the word "personally" before the word

Dull (Tex.), 8 S. W. Rep. 530; McMullen v. Eagan, 21 W. Va. 233; Roney v. Moss, 76 Ala. 491; Monroe v. Arledge, 23 Tex. 480; Mullen v. Boone, 63 Tex. 91. See following cases as to substantial compliance with the statute. Watkins v. Hall, 57 Tex. 1; Balbaze v. Ratto (Tex.), 7 S. W. Rep. 501; McCormack v. James, 36 Fed. Rep. 14; Schramm v. Gentry, 63 Tex. 583; Little v. Weatherford, *Id.* 638; Donohue v. Mills, 41 Ark. 429; Gordon v. Leech, 81 Ky. 229.

[1] Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; Flanagan v. Young, 2 Har. & M. (Md.) 38; Wetmore v. Laird, 5 Biss. 160.

[2] Vance v. Schuyler, 6 Ill. 160; Wiley v. Bean, *Id.* 302; Johnson v. Badger, etc. Co., 13 Nev. 351; Doe v. Reed, 3 Ill. 371; Davar v. Cardwell, 27 Ind. 478; Tiffany v. Glover, 3 C. Greene, 387; Dickerson v. Davis, 12 Iowa, 353; Cavender v. Smith, 5 Iowa, 157; Morse v. Clayton, 21 Miss. 373; Pickett v. Doe, 5 Smed. & M. 470; Halls v. Thompson, 1 Smed. & M. 443; Alexander v. Merry, 9 Mo. 514; Talbot v. Simpson, Pet. C. C. Rep. 188; Monroe v. Arledge, 23 Tex. 478; Carpenter v. Dexter, 8 Wall. 513; Hartshorn v. Dawson, 79 Ill. 108; Schley v. Pullman Car Co., 120 U. S. 575. The acknowledgment of a *feme covert*, as shown by the magistrate's certificate, agreeing in substance, though not in words, with that prescribed by the statute, *held* sufficient. Owen v. Norris, 5 Blackf. 479; Stevens v. Doe, 6 Blackf. 475; Watson v. Clendenin, *Id.* 477; Hughes v. Lane, 11 Ill. 123; Tubbs v. Gatewood, 27 Ark. 128. See Becker v. Quigg, 54 Ill. 390; Huxley v. Harrold, 62 Mo. 516. It is the policy of the law to uphold certificates of acknowledgment, whenever substance is found, and not to suffer conveyances or proof of them to be defeated by technical or unsubstantial objections. In construing them resort may be had to the deed or instrument to which they are appended. Wells v. Atkinson, 24 Minn. 161. Where the statute merely requires an instrument to be acknowledged, without prescribing any form of certificate, or providing what it shall contain, it is sufficient if it fairly appears therefrom, that the person who executed the instrument appeared in person before the officer and acknowledged it as his act and deed. Brunswick-Balke Co. v. Brackett (Minn.), 33 N. W. Rep. 214.

[3] Jacoway v. Gault, 20 Ark. 190; Hobson v. Kissam, 8 Ala. 357. See Sharp v. Hamilton, 12 N. J. L. 109.

"known" is not fatal to the validity of the certificate.[1] And where the certificate of acknowledgment to a deed described it as the "foregoing mortgage," it was held to be a clerical error, not affecting the certificate.[2] In another case the words "legally authorized and assigned" were held to import the same as "duly commissioned and sworn."[3] But important words, omitted in the certificate, cannot be supplied by intendment or construction,[4] nor the defect helped by parol evidence.[5] The fact of acknowledgment, and the identity of the party, are essential parts, and must be stated in the certificate. Where the certificate omits to state that the party acknowledging was personally known, or in some way fails to identify such party, it is insufficient.[6] And the party who executes a deed must ac-

[1] Rosenthal v. Griffin, 23 Iowa, 263; Davis v. Bogle, 11 Heisk. 315; Todd v. Jones, 22 Iowa, 146; Alexander v. Merry, 9 Mo. 514; Hunt v. Johnson, 19 N. Y. 279; Sheldon v. Stryker, 42 Barb. 284; Jackson v. Gumaer, 2 Cowen, 552; Thurman v. Cameron, 24 Wend. 87; Hopkins v. Delaney, 8 Cal. 85; Welch v. Sullivan, *Id.* 511. In Scharfenburg v. Bishop, 35 Iowa, 60, where the word "appeared" was omitted after the phrase "before me personally," it was held that the omission was manifestly a clerical error, and not fatal to the validity of the instrument.

[2] Ives v. Kimball, 1 Mich. 308. So, also, where the certificate stated that "the contents and meaning of said husband were fully explained and made known to her," instead of using the word "deed" in place of the word "husband." Calumet, etc. Co. v. Russell, 68 Ill. 426.

[3] Hall v. Gittings, 2 Har. & J. (Md.) 380.

[4] Jacoway v. Gault, 20 Ark. 190; Stanton v. Button, 2 Conn. 527.

[5] Hayden v. Westcott, 11 Conn. 129; Pendleton v. Button, 3 Conn. 406; O'Ferrall v. Simplot, 4 Iowa, 381. Where the certificate of acknowledgment of a deed by a married woman does not show that she was examined separate and apart from her husband, parol evidence is not admissible to prove that she was so examined. Harty v. Ladd, 3 Oreg. 353; Jordan v. Corey, 2 Ind. 385.

[6] Fogarty v. Finley, 10 Cal. 239; Wolf v. Fogarty, 6 Cal. 224; Kimball v. Semple, 25 Cal. 440; Hayden v. Westcott, 11 Conn. 129. See Sanford v. Bulkley, 30 Conn. 344; Tully v. Davis, 30 Ill. 103; Brinton v. Seevers, 12 Iowa, 389; Pecock v. Tompkins, 1 Humph. 135; Fall v. Roper, 3 Head, 485; Johnson v. Walton, 1 Sneed, 258; Garnett v. Stockton, 7 Humph. 84; Callaway v. Fash, 50 Mo. 420; Smith v. Garden, 28 Wis. 685; Pickney v. Burrage, 31 N. J. L. 21. When the statute provides that the certificate shall set forth that the person making the acknowledgment is "personally known," the words "I am satisfied," will not

knowledge it to the officer to be his deed, either by the use of that word, or some other word equivalent to it, or it will be invalid.[1] Statutory provisions in regard to the private examination of married women [2] are also construed to be mandatory.[3] Thus, where the word "voluntary" was omit-

suffice. Shepard v. Carriel, 19 Ill. 313. The statute requiring an officer to certify to his personal knowledge of the person acknowledging being the individual whose name is subscribed to the deed, does not apply to sheriffs' deeds. Lamarque v. Langlais, 8 Mo. 328; Ogden v. Walters, 12 Kan. 282. In Tennessee it is not necessary that the magistrate certify that he is personally acquainted with the wife. Mount v. Kesterson, 6 Coldw. 452. A certificate of acknowledgment which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in, and who executed it as prescribed by N. Y. statute, is insufficient to entitle the deed to be recorded. But it is effectual to pass the title of the grantors, save as against a subsequent *bona fide* purchaser. Fryer v. Rockefeller, 63 N. Y. 208. A certificate stating that the grantor is "personally known" to the officer is a substantial compliance with a statute requiring such certiffcate to show that the grantor is a person with whom the officer is "personally acquainted," and is sufficient. Kelly v. Calhoun, 95 U. S. 710. When the certificate does not contain the words of identity the deed and attestation may be resorted to, to show the fact. Hiler v. LaFlesh, 59 Wis. 465. And certificate stating that grantor "personally came" is sufficient. Schley v. Pullman Car Co., 7 S. C. Rep. 730.

[1] Short v. Conlee, 28 Ill. 219; Stanton v. Button, 2 Conn. 527; where the word "acknowledge" was omitted. In Ingraham v. Grigg, 13 Smed. & M. 22, the court held that the certificate of an officer authorized to take the acknowledgment of deeds, that the grantor "made oath that he signed, sealed and delivered said deed as his proper act," though in the form of a *jurat*, was not thereby deprived of the character of an acknowledgment. And see Spitznogle v. Vanhesoch, 13 Neb. 338.

[2] See as to the various provisions Stimson's Amer. Stat. § 6501.

[3] Mount v. Kesterson, 6 Coldw. (Tenn.) 452; Murdock v. Memphis, etc. R. Co. 7 Baxter (Tenn.), 557; Laidley v. Knight, 23 W. Va. 735; McMullen v. Eagan, 21 W. Va. 253; Muir v. Galloway, 61 Cal. 498; Powell's Appeal, 98 Pa. St. 403; Clayton v. Rose, 87 N. C. 106; Coombes v. Thomas, 57 Texas, 321; Langten v. Marshall, 59 Tex. 276; Belo v. Mayes, 79 Mo. 67; Coburn v. Herrington, 114 Ill. 104; Davis v. Agness, 67 Tex. 206. And see Walter v. Weaver, *Ibid.* 569; In New Jersey the acknowledgment by a husband and wife of a mortgage on land of the wife, her separate estate, without her acknowledgment on private examination apart from her husband, was held defective, and the mortgage void as to her. Armstrong v. Ross, 20 N. J. Eq. 109. And see Woodbourne v. Gorrel, 66 N. C. 82; Linn v. Patton,

ted in the certificate of the wife's acknowledgment, it was held that the deed conveyed no title.[1] And certificate failing to state that the deed was explained to her, as required by statute, would be insufficient to pass the wife's interest,[2] and a married woman is not estopped in the absence of fraud or misrepresentation, by a deed shown on its face not to have been acknowledged in compliance with the statute.[3] "The certificate of the acknowledging officer should be founded on his own knowledge that the wife acts freely and independently of any coercion on the part of the husband, which the law presumes from his presence, even though it may not be apparent; and such knowledge should be obtained by intelligent interchange of conversation, without relying on the aid or statements of any person other than the one whose acknowledgment he proposes to take. A mere formal inquiry, made in English to a person who does not understand that language, is not such intelligent conversation." [4]

§ 261. **The Certificate must be Subscribed—Seal of Office.**—The certificate of acknowledgment must be subscribed. The name of the officer in the body of the certificate is not sufficient.[5] And where required by statute,

10 W. Va. 187; Becker v. Quigg, 54 Ill. 390; Robbins v. Harris, 96 N. C. 557. The statutory provisions concerning the privy examination of married women acknowledging deeds have no application to the case of a married woman living apart from her husband under decree of separation. Delafield v. Brady, 38 Hun (N. Y.), 404. And see Hand v. Hand, 68 Cal. 135. If a married woman's mental condition was such that her privy examination could not be made, her deed is void. Garth v. Fort, 15 Lea (Tenn.), 683. Since the adoption of Ark. Const. 1874, a married woman's deed is good without acknowledgment. Stone v. Stone, 43 Ark. 660.

[1] Laird v. Scott, 5 Heisk. (Tenn.) 314. In Maryland the omission of the words "ill usage" *held* to invalidate the deed. Hawkins v. Burress, 1 Har. & J. 513.

[2] Bolling v. Teel, 76 Va. 487; Burnett v. McCluey, 78 Mo. 676; Langten v. Marshall, 59 Tex. 296.

[3] Johnson v. Bryan, 62 Tex. 623; Coal Co. v. Pasco, 79 Ill. 170.

[4] Fisher v. Meister, 24 Mich. 447; Harrison v. Oakman, 56 Mich. 390.

[5] Marston v. Brashaw, 18 Mich. 81. See Watson v. Clendenin, 6 Blackf. 477; Duncan v. Duncan, 1 Watts, 322; Barney v. Sutton, 2 Watts, 31.

it must be attested by his seal of office.[1] A notary's certificate which declares that he has affixed his seal thereto, is defective without it;[2] he cannot substitute a private seal or scroll.[3] But in some of the States, the acknowledgment of a deed taken before an officer that is entitled to have a seal is good, although he has none.[4] In which case an acknowledgment taken under his private seal is valid, if it is stated in the instrument that he has no seal of office.[5] As to what will constitute a sufficient official seal, it has been held that, in the absence of any statutory regulations on the subject in the State where the notary derives and exercises his authority, any device upon which are engraved words descriptive of his office, and the name of the county and State of his residence, constitutes a sufficient official seal, without the stamping of the notary's name thereon.[6]

§ 262. **The Acknowledgment to be Certified on the Same Paper with the Deed.**—Where the statute provided that the officer taking the acknowledgment of a deed should certify such acknowledgment on the same sheet on which the deed was printed or written, a certificate upon a sepa-

[1] Hastings v. Vaugh, 5 Cal. 315; Booth v. Cook, 20 Ill. 129; Wetmore v. Laird, 5 Biss. 160; Buell v. Irwin, 24 Mich. 145; Miller v. Henshaw, 4 Dana, 325. The omission in the certificate of the word "seal" between "and—of office," was held immaterial. Nichols v. Stewart, 15 Tex. 226. The signature of J. B. and a seal with the words "J. B., Commissioner, N. J.," appended to an acknowledgment of a deed, are sufficient proof that it was executed under his hand and seal, without a statement to that effect in the paper. Harrington v. Fish, 10 Mich. 415. Official seal not necessary to certificate of acknowledgment in Alabama. Harrison v. Simons, 55 Ala. 510.

[2] Ballard v. Perry, 28 Tex. 347; Mason v. Brock, 12 Ill. 273.

[3] Skinner v. Fulton, 39 Ill. 484; Mason v. Brock, 12 Ill. 273.

[4] Ingoldsby v. Juan, 12 Cal. 564. See Irving v. Brownell, 11 Ill. 402; Farnum v. Buffum, 4 Cush. 260; Fund Commissioners v. Glass, 17 Ohio, 542; Jaques v. Weeks, 7 Watts. 261; Hackney v. Williams, 6 Yerg. 340. And see Colby v. McOmber (Iowa), 32 N. W. Rep. 459.

[5] Fogarty v. Sawyer, 23 Cal. 570; Collins v. Boyd, 5 Dana, 316.

[6] *In re* Phillips, 14 Nat. Bkcy. Reg. 219. Notwithstanding Gantt's Ark. Dig. § 4302, providing that a notarial seal "shall be engraved so as to present" certain emblems, the absence of them from the seal would not invalidate the certificate of acknowledgment. Sonfild v. Thompson, 42 Ark. 46.

rate strip of paper attached to the deed by a wafer, with the officer's seal upon the same, was held bad.[1]

§ 263. **The Certificate how far Conclusive of the Facts Stated.**—An officer, after having taken and certified an acknowledgment, will not be permitted to defeat its effect by impeaching his own certificate.[2] But in some of the States, a certificate in due form is only *prima facie* evidence that the officer before whom it was taken complied with the law in taking the same.[3] Thus, it has been held that "the acknowledgment, annexed to a deed, that it was the free and voluntary act of the grantor, is not conclusive of the fact, but may be disproved by proper evidence, when the grantor seeks to avoid the deed on the ground of fraud, force or intimidation."[4] But the proof must be clear and undoubted.[5] Extraneous evidence is also admissible in some

[1] Winkler v. Higgins, 9 Ohio St. 599.

[2] Central Bank v. Copeland, 18 Md. 305; Stone v. Montgomery, 35 Miss. 83; Allen v. Lenoir, 53 Miss. 321. A mortgage bore the notarial seal and signature of S. S., but S. S., testified that he never affixed his seal to it, and that he believed himself to be the only S. S. notary in Cincinnati. *Held*, that the seal *prima facie* proved itself, and that the presumption in favor of the deed was not rebutted. Wright v. Bundy, 11 Ind. 398. A certificate of acknowledgment is not invalidated or affected by the want of recollection of the grantor or commissioner as to the tranaction. Tooker v. Sloan, 30 N. J. Eq. 394.

[3] Dodge v. Hollingshead, 6 Minn. 25: Annan v. Folsom, *Id.* 500; Hutchison v. Rust, 2 Gratt. 394; Jackson v. Schoonmaker, 4 Johns. 161; Edgerton v. Jones, 10 Minn. 429. But see Bissett v. Bissett, 1 H. & Mc. H. 211; Hartley v. Frosh, 6 Texas, 208.

[4] Central Bank v. Copeland, 18 Md. 305. In the absence of any proof of fraud or collusion, the magistrate's certificate must prevail over the unsupported testimony of the grantor that it was forged. Lickmon v. Harding, 65 Ill. 505; Russell v. Baptist Theological Union, 73 Ill. 337.

[5] The certificate of the acknowledgment of a deed imports verity, and cannot be overcome, except by clear and satisfactory evidence. The evidence of the grantor denying the execution of the deed, and the opinion of experts that the signature thereto is not that of the grantor, is not sufficient. Proof that the signature is not in the handwriting of the grantor, falls far short of showing it to be a forgery. By acknowledging, the party adopts the signature and makes it his own. Tunison v. Chamblin, 88 Ill. 379. And see Crane v. Crane, 81 Ill. 165; Lowell v. Wren, 80 Ill. 238; Marston v. Bittenham, 76 Ill. 611; Kerr v. Russell, 69 Ill. 666; Calumet, etc. Dock Co. v. Russell, 68 Ill. 426; Lickmon v

of the States to prove that the wife was not examined, in taking the acknowledgment, privily and apart from her husband, as required by law.[1] But in Maryland, Texas and Indiana the certificate is conclusive.[2] As a general rule, it is conclusive in the absence of fraud or imposition; and although it is not conclusive between the parties, it is as to subsequent purchasers for a valuable consideration without notice.[3]

§ 264. **Mistakes in the Certificate may be Corrected, how.**—The officer taking the acknowledgment of a deed has a right, and it is his duty to correct, at any time, any mistake in his certificate, conformably with the facts;[4] and he may be compelled to do so by *mandamus;* but a court of equity has no jurisdiction to correct such a mistake.[5] Nor is the omission of a word cured by its insertion in the record of the deed.[6] A fraudulent alteration in the certificate of acknowledgment affects the proof of its execution, but not the validity of the deed.[7] It may be added that a defective acknowledgment can only be taken advantage of by a purchaser for valuable consideration.[8]

Harding, 65 Ill. 505; Monroe v. Poorman, 62 Ill. 523; McPherson v. Sanborn (Supreme Court of Ill.), 7 Cent. L. J. 195.

[1] Ford v. Teal, 7 Bush, 156; Woodhead v. Foulds, *Id.* 222; Dodge v. Hollingshead, 6 Minn. 25; Landers v. Bolton, 26 Cal. 406; Borland v. Walrath, 33 Iowa, 130. The certificate may be impeached for fraud, duress, or undue influence exercised by the husband over the wife. Eyster v. Hatheway, 50 Ill. 521. See Fisher v. Meister, 24 Mich. 447.

[2] Bissett v. Bissett, 1 H. & McH. 211; Hartley v. Frosh, 6 Texas, 208; McNeely v. Rucker, 6 Blackf. 391.

[3] Williams v. Baker, 71 Pa. St. 482. See Bishop v. Schneider, 46 Mo. 472. Parol evidence cannot, in the absence of fraud, be admitted to contradict a fact expressly stated by the clerk in his certificate of acknowledgment. Harpending v. Wylie, 14 Bush (Ky.), 380.

[4] Jordan v. Corey, 2 Ind. 385.

[5] Wannall v. Kem, 51 Mo. 150; O'Ferrell v. Simplot, 4 Iowa, 381. But see Simpson v. Montgomery, 25 Ark. 365.

[6] Newman v. Samuels, 17 Iowa, 528.

[7] Devinney v. Reynolds, 1 Watts & S. 328. Parol evidence held not admissible to show that the acknowledgment by the sheriff of a deed had been fraudulently altered by the prothonotary clerk. Hoffman v. Coster, 2 Whart. (Pa.) 453.

[8] In all cases, the purchaser must show that he paid the purchase-money

§ 265. **Statutes Designed to Cure Defects in Acknowledgments** have been enacted at different times, in several of the States, some of which have been held void as impairing vested rights;[1] while others have been held binding, notwithstanding their retrospective operation.[2] In Alabama, the act of February 8, 1858, providing that "no deed of conveyance of any land, heretofore made and executed by husband and wife, shall be deemed invalid, or defective, or insufficient in law, by reason of any informality or omission in the acknowledgment," was held unconstitutional.[3] In Iowa, the act of 1858, declaring the acknowledgment of all recorded deeds to be valid, whether acknowledged in compliance with previously existing laws or not, is not considered void as impairing the obligation of contracts, but is so in so far as it impairs vested rights.[4] And the Pennsylvania statute of 1840, to cure defects in acknowledgments, is not construed retrospectively so as to affect the rights of third persons, not parties to them.[5] In Texas, under the statute providing that where the acknowledgment of any instrument in writing may be properly made but defectively certified any party may have an action in the district court correcting the certificate, it was held not to

before he will be entitled to relief on account of not having notice. Mastin v. Haley, 61 Mo. 196; *Infra*, § 288.

[1] Logan v. Williams, 76 Ill. 175; Carpenter v. Dexter, 8 Wall. 513.

[2] Raverty v. Fridge, 3 McLean, 230; Barton v. Morris, 15 Ohio, 408; Watson v. Mercer, 8 Pet. 88; Barnet v. Barnet, 15 Serg. & R. (Pa.) 72; Tate v. Stoolitzfoos, 16 Serg. & R. 35; McMasters v. The Commonwealth, 3 Watts, 294.

[3] Alabama, etc. Ins. Co. v. Boykin, 38 Ala. 510.

[4] Brinton v. Seevers, 12 Iowa, 389. It does not cure defects in acknowledgments made after it took effect. Reynolds v. Kingsbury, 15 Iowa, 238; Jones v. Berkshire, *Id.* 248. And does not apply against a purchaser without notice for a valuable consideration. Newman v. Samuels, 17 Iowa, 528. Under Code Iowa, § 1967, acknowledgments defectively taken are cured, if taken and certified prior to April 30, 1872, and duly recorded. Buckley v. Early (Iowa), 33 N. W. Rep. 769. See Garnett v. Stockton, 7 Humph. (Tenn.) 84.

[5] Green v. Drinker, 7 Watts & S. 440.

permit the validating of a conveyance when the law had not been complied with in taking the acknowledgment.[1]

§ 266. **Proof by Subscribing Witnesses.**—The statutes of many, if not all of the States, provide for proving the execution of deeds and other instruments intended to be recorded, by the oath of a subscribing witness, or witnesses, or, when the witnesses cannot be had, by proof of the handwriting of the grantor and witnesses, which shall have the same effect as an acknowledgment.[2] But the practice is very seldom resorted to. A defect in, or the want of an acknowledgment may frequently be cured in this way. But where a married woman is required to be examined by the officer, she must, in general, be present and acknowledge the instrument.

ARTICLE II.

REGISTRATION OF DEEDS.

SECTION.

269. Registration differs from enrollment.
270. Equivalent to livery of seizin.
271. When the record of a deed is constructive notice.
272. At what time the record takes effect as notice.
273. Time allowed for recording—precedence of record.
274. When a deed is to be considered as recorded.
275. In what way the date of filing may be proved.
276. To whom the record of a deed is notice.
277. Of what facts the record is notice.
278. As to deeds disconnected from the chain of title.
279. Notice from any other source equivalent to record.
280. Possession of the premises is notice, when.
281. As to what will constitute actual notice.
282. Notice to the agent is notice to the principal.
283. The degree of proof required to establish actual notice.
284. An unrecorded deed is void, when.

[1] Johnson v. Taylor, 60 Tex. 360.

[2] Stimson's Amer. Stat., §§ 1590-1606.

285. Of purchasers by quitclaim deed.
286. As to the rights of a purchaser from an heir.
287. Purchasers at sheriff's sale entitled to benefit of statute.
288. Equity extinguished by a purchase without notice.
289. Effect of a mistake in the record.
290. Seal of officer taking acknowledgment need not be recorded.
291. Whether the record of a deed is effectual until indexed.
292. Corrections and alterations of the record.

§ 269. **Registration Differs from Enrollment.**—The system of recording deeds, which has been universally adopted throughout the United States, is something distinct from the enrollment of deeds of bargain and sale, as required by the English statute,[1] which was essential to the validity of such deeds. With few exceptions, the validity of deeds, as between the original parties to them, is not affected by their registration.[2] Enrollment, according to the English statute, has never been considered necessary to the validity of a deed of bargain and sale in this country.[3]

§ 270. **Registration Equivalent to Livery of Seizin.**—The purposes of registration are chiefly to make public, and to preserve the evidence of the transfer of lands.[4] Deeds entered upon the public records are, of course, open to the inspection of all persons who may have occasion at any time to examine the same. And this supersedes the necessity of livery of seizin.[5] In Pennsylvania, the act which established a registry of deeds provided that all deeds or conveyances made, or to be made, and proved or

[1] 27 Henry VIII., ch. 16.

[2] See §§ 249, 279. The intention of the statutes in North and South Carolina seems to be that deeds not recorded within the prescribed time shall become void. S. C. Rev. Stat. 1873, p. 422, § 1; N. C. Laws 1876-7, ch. 23, § 1. See § 273, *note*.

[3] Givan v. Doe, 7 Blackf. 210; Jackson v. Wood, 12 Johns. 74; Welch v. Foster, 12 Mass. 96; Report of Pennsylvania Judges on British Statutes, 3 Binney, 595.

[4] As to the various provisions of statute see Stimson's Amer. Stat., §§ 1610-1632.

[5] Mathews v. Ward, 10 Gill & J. (Md.) 443; Bryan v. Bradley, 16 Conn. 474; Higbee v. Rice, 5 Mass. 344; Caldwell v. Fulton, 31 Pa. St. 483; Wyman v. Brown, 50 Me. 160; Williamson v. Caretor, 51 Me. 452; Blethen v. Dwinel, 34 Me. 135.

acknowledged and recorded, according to its provisions, should be of the same force and effect for the giving of possession and seizin and making good the title and assurances of the land, as deeds of feoffment, with livery of seizin, or deeds enrolled in any of the king's courts were in Great Britain.[1] And statutes of similar import have, it is believed, been enacted in other States.

§ 271. **When the Record of a Deed is Constructive Notice.**—Registration is also made to operate as constructive notice between prior and subsequent purchasers, creditors and mortgagees. But it is to be remembered, that the system is the creation of the statute, and the registration of a deed or other writing, is of no effect as notice, unless made so by statute.[2] Thus it follows, that the record of a deed is not constructive notice of its existence or contents, unless the prerequisites prescribed by law to be observed in respect to its registration, such as its acknowledgment or proof, have been complied with.[3] The placing of a deed

[1] Bright. Purd. Dig. Stat., vol. 1, p. 472, § 74.

[2] Baker v. Washington, 5 Stew. & P. (Ala.) 142; Tatum v. Young, 1 Port. (Ala.) 298; Barney v. Little, 15 Iowa, 527; Burton v. Martz, 38 Mich. 762. The registration laws of the State do not apply to the disposition of lands belonging to the United States; but the rights of parties will be governed by the regulations established by Congress, until the title has finally passed from the government. David v. Rickabaugh, 32 Iowa, 540.

[3] Galt v. Dibrell, 10 Yerg. 146; Holliday v. Cromwell, 26 Tex. 188; Whitehead v. Foley, 28 Tex. 268; Isham v. Bennington Iron Co., 19 Vt. 230; Pope v. Henry, 24 Vt. 560; Lewis v. Baird, 3 McLean, 56; Walker v. Gilbert, 1 Freem. Ch. 85; Suiter v. Turner, 10 Iowa, 517; Brinton v. Seevers, 12 Iowa, 389; Reynolds v. Kingsbury, 15 Iowa, 238; Mummy v. Johnson, 3 A. K. Marsh. 220; Edwards v. Brinker, 9 Dana, 69; Dewitt v. Moulton, 17 Me. 418; Brown v. Lunt, 37 Me. 423; Blood v. Blood, 23 Pick. 252; Ely v. Wilcox, 20 Wis. 523; Herndon v. Kimball, 7 Ga. 432; Schultz v. Moore, 1 McLean, 523; Stevens v. Hampton, 46 Mo. 408; Chouteau v. Jones, 11 Ill. 300; Bishop v. Schneider, 46 Mo. 472; Cox v. Wayt, 26 W. Va. 807. But such an instrument is valid as to all parties who have actual notice of its contents. Bass v. Estill, 50 Miss. 300; Pringle v. Dunn, 37 Wis. 465. The acknowledgment before a competent officer and not the attestation entitles an instrument to registration. Brydon v. Campbell, 40 Md. 331.

on record, in a manner not authorized by law, gives it no additional validity or effect.[1] And the same is true of any instrument not required by law to be recorded.[2] Nor is the record of a deed, defective in the formal requisites of its execution or proof, notice of title to any one.[3] In some of the States, however, among which are Kansas and Illinois, defectively executed deeds may be recorded, and are notice of the equities created by them.[4] The record of a deed is constructive notice of such facts only as a reader may learn by an examination of the record. Such notice does not extend to facts which he might have ascertained by an inquiry suggested by the record. And a record which does not show that the instrument was entitled to be recorded, such as one that omits the authentication, is inoperative: it does not give legal notice at all.[5] It has been held that a forged

[1] *Ibid;* Tillman v. Cowand, 12 Smed. & M. 262; Oatman v. Fowler, 43 Vt. 462.

[2] Moore v. Hunter, 6 Ill. 317; Reed v. Cosale, 4 Ind. 283; Parret v. Shaubhut, 5 Minn. 323; Ludlow v. Van Ness, 8 Bosw. (N. Y.) 178; Lewis v. Baird, 3 McLean, 56; Villard v. Robert, 1 Strobh. Eq. 393; Commonwealth v. Rodes, 6 B. Mon. 171; Burnham v. Chandler, 15 Tex. 441; Bossard v. White, 9 Rich. Eq. 483; Galpin v. Abbott, 6 Mich. 17; Graves v. Graves, 6 Gray, 391; Pringle v. Dunn, 37 Wis. 449; Monroe v. Hamilton, 60 Ala. 227. In the following cases the recording of a certified copy of the record of a deed was held not authorized by the recording acts. Lund v. Rice, 9 Minn. 230; Lewis v. Baird, 3 McLean, 56; Stevens v. Brown, 3 Vt. 420; Pollard v. Lively, 2 Gratt. 216.

[3] Harper v. Barsh, 10 Rich. Eq. 149; Isham v. Bennington Iron Co., 19 Vt. 215; Bass v. Estill, 50 Miss. 300; Pringle v. Dunn, 37 Wis. 456; Loughridge v. Bowland, 52 Miss. 546; Wickersham v. Chicago Zinc Co., 18 Kan. 481; Dozier v. Barnett, 13 Bush. 457; Westerman v. Foster, 57 Ind. 408.

[4] Simpson v. Mundee, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76; Reed v. Kemp, 16 Ill. 445; Ill. Rev. Stats., 1877, p. 277, § 31. And see Gillespie v. Reed, 3 McLean, 377; Healey v. Worth, 35 Mich. 166. A deed of trust executed by a married woman, her husband not uniting therein, to secure the purchase-money due on the premises, though void as a conveyance, is, nevertheless, an instrument in writing relating to real estate, and, when recorded, is constructive notice to all subsequent purchasers of the lien of the original vendor upon the same for the unpaid price. Morrison v. Brown, 83 Ill. 562. Recording a void deed does not give constructive notice of equities which (by reason of facts *aliunde*) the grantee may have under it. Loomis v. Bush, 36 Mich. 40.

[5] Taylor v. Harrison, 17 Tex. 454.

deed is not within the operation of the recording acts, and that however innocently one may have purchased under such recorded deed, he has no rights as against the true owner of the land.[1]

The record of a deed in the wrong county has no effect as notice.[2] But where a deed has been once duly recorded in the proper county, it need not be afterwards recorded in a different county into which the territory has been formed, or to which it has been attached.[3] Where land lies in two counties, a deed conveying it must, in general, be recorded in both.[4] But in the cases cited below, it was held that this was not necessary, and that it might be recorded in either.[5] And upon principle, if a deed be recorded in the wrong office,[6] or in a book not commonly used for that purpose, and there is nothing to put the party upon inquiry, it is no notice.[7]

§ 272. **At what Time the Record takes Effect as Notice.** —Although the recording acts passed by the several States are substantially the same in effect, they all differ more or less in executive provisions, which are to be observed in the conveyance of lands situated within their respective jurisdictions.[8] Thus, in some of the States, a deed takes effect

[1] Pry v. Pry, 109 Ill. 466.

[2] Perrin v. Reed, 35 Vt. 2; Stewart v. McSweeny, 14 Wis. 468; Harper v. Tapley, 35 Miss. 510; Adams v. Hayden, 60 Tex. 151. And a copy of such record is no notice. Lewis v. Baird, 3 McLean, 56; Pollard v. Lively, 2 Gratt. (Va.) 216.

[3] McKissick v. Colquhoun, 18 Tex. 148; Jones v. Powers, 65 Tex. 207. A deed must be recorded in the county where the land lies, at the time it is left to be registered. Garrison v. Haydon, 1 J. J. Marsh. 222; Bell v. Fry, 5 Dana, 344.

[4] Harper v. Tapley, 35 Miss. 506; Horsley v. Garth, 2 Gratt. 471.

[5] Conn v. Manifee, 2 A. K. Marsh. 396; Simms v. Read, Cooke (Tenn.), 346; Delacey v. McKeen, 1 Wash. C. C. 354; Scott v. Leather, 3 Yeates (Pa.), 184; Jackson v. Rice, 3 Wend. (N. Y.) 180.

[6] Simon v. Kaliske, 1 Sweeny, 304.

[7] Colomer v. Morgan, 13 La. Ann. 202; Sawyer v. Adams, 8 Vt. 172. But see Conklin v. Hinds, 16 Minn. 457.

[8] The registration laws of the several States do not operate extraterritorially; nor do those of one State operate upon conveyances executed

as against creditors, or subsequent purchasers without notice, from the date of record only; while in others the deed may be recorded within a certain time after its execution, some greater and others a less time, and the record takes effect by relation from the time when the deed was made. Among the States in which the record of a deed is constructive notice from the date of filing only, are Alabama, Arkansas, California, Connecticut, Colorado, Dakota, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, Tennessee, Texas, Vermont, Virginia and Wisconsin.[1] In the District of Columbia, all deeds, except deeds of trust and mortgages, filed for record within six months from the date of acknowledgment, take effect from the date of delivery, as to all persons.[2] In Delaware and Georgia, one year is allow for recording;[3] in Pennsylvania, Ohio and Maryland, six months:[4] in Mississippi, three

in another State, unless express words to that effect be inserted in the statute. Hundley v. Mount, 8 Smed. & M. 387; *ante*, § 255.

[1] Ala. Code, 1876, § 2149. But three months are allowed for recording "all conveyances, mortgages, and instruments in the nature of mortgages, to secure debts created at the dates thereof." *Ibid.* § 2166; Ark. Dig. Stats., 1874, § 5025; Cal. Civil Code, 1874, § 1170; Conn. Gen. Stats., 1875, p. 353, § 11; Col. Gen. Laws, 1877, p. 139, § 17; Dakota Rev. Code, 1877, p. 341; Bush's Fla. Dig., 1872, p. 151, § 9; Ill. Rev. Stat., 1877, p. 277, § 30; Iowa Code, 1873, § 1941; Kas. Comp. Laws, 1879, § 1043; La. Rev. Stats., 1876, § 3081; Me. Rev. Stats., 1871, p. 560, § 8; Mass., Cushing v. Hurd, 4 Pick. 252, 256; Mich. Comp. Laws, 1871, § 4231; Minn. Stats. at Large, 1873, p. 639, § 21; Mo. Rev. Stats., 1879, § 691; Gen. Stats. Neb., 1873, p. 875, § 16; Gen. Stats. N. H., 1867, p. 252, § 4; Tenn. Stats., 1871, § 2072; Woodward v. Boro, Lea (Tenn.), 678; Tex. Rev. Stats., 1879, § 4299; Gen. Stats. Vt., 1870, p. 448, § 7; Va. Code, 1873, Tit. 33, ch. 117, § 2; Wis. Stats., 1871, ch. 86, § 27.

[2] Rev. Stats., 1873-4, p. 62. Deeds of trust and mortgages are notice from the date of filing only. *Ibid.*

[3] Ga. Code, pt. 2, § 2705; Del. Rev. Code, 1852, p. 269.

[4] Bright. Purd. Dig. Stats. Pa., 1873, p. 473, § 476; Ohio Rev. Stats., 1880, § 4134. Mortgages take effect only from the date of record, as to subsequent purchasers without notice. *Ibid.*, § 4133; Md. Rev. Code, 1878, art. 11, § 16.

months;[1] in Kentucky, sixty days;[2] in Indiana, forty-five days;[3] in New Jersey, fifteen days,[4] and Oregon, five days.[5]

§ 273. **Time Allowed for Recording—Precedence of Record.**—In general, where statutes require deeds to be recorded within a prescribed time, a deed thus recorded is valid against one who purchases between the date of its delivery and the date of record.[6] But it seems that, in South Carolina, the first deed recorded will take precedence over another that was recorded later, although still in time.[7] Deeds recorded after prescribed time are, in most States, notice from the date of record, but do not relate back to any prior time.[8] In Georgia the only difference between recording within twelve months, and afterwards, is that in the first case the record of a deed is notice from the time of execution, in the latter from the time of record.[9] If two successive deeds are made to the same land, and neither recorded within the prescribed time, the recording of the

[1] Miss. Rev. Code, 1871, § 2306. Mortgages are valid only from the date of deposit with the clerk for record. Claiborne v. Holmes, 51 Miss. 146.

[2] Gen. Stats., 1879, ch. 24, § 14. Mortgages take effect only from the date of record. *Ibid.*, § 10. See also, Finlay v. Spratt, 14 Ky. 225.

[3] Rev. Stats. Ind., 1887, p. 635, § 16.

[4] N. J. Revision, 1877, p. 155, § 14. And see Semon v. Terhune, 40 N. J. Eq. 364. The N. J. registry act does not apply to leases. Hutchinson v. Bramhall, 42 N. J. Eq. 372, reversing S. C. 40 N. J. Eq. 83.

[5] Fleschner v. Sumpton, 12 Oreg. 161.

[6] Dale v. Arnold, 2 Bibb (Ky.), 605; Hamilton v. Russell, 1 Cranch, 315; *ante*, § 284.

[7] The object of the statute appears to be to compel all deeds to be recorded within the prescribed time, or to become void. Deeds made out of the State may be recorded within one year, and, if made out of the United States, within two years. Mortgages must be recorded within sixty days. S. C. Rev. Stat. 1873, p. 422, § 1. In North Carolina the provision is as follows: "No conveyance of land shall be good unless the same * * shall be registered in the county where the land shall lie, within two years after the date of the said deed." Laws 1876-7, ch. 23, § 1.

[8] Meni v. Rathbone, 21 Ind. 454; Irvin v. Smith, 17 Ohio, 226; Mallory v. Stodder, 6 Ala. 801; Delane v. Moore, 14 How. 253; Steele v. Mansell, 6 Rich. (S. C.) 437; Belk v. Massey, 11 Rich. 614.

[9] Anderson v. Dugos, 29 Ga. 440. And see Vreeland v. Clafflin, 24 N. J. Eq. 313.

second after that time, but prior to the first, does not give it precedence over the first.[1] But in Pennsylvania and Ohio, in such a case, if the second deed is taken without notice of the first, and recorded first, it will take precedence.[2]

§ 274. **When a Deed is to be Considered as Recorded.** —As a general rule, the date of the record of a deed has reference to the time of its being filed or deposited with the proper recording officer at the office of registration.[3] It is sufficient if the deed is delivered to a person who is in charge of the office and acting as recorder; a party is not required to ascertain whether the person is recorder *de jure*.[4] In general, a clerk is not bound to receive a deed, or permit it to be deposited in the office, until the tax on it has been paid; but if he permits it to be deposited without payment, he is bound to record it.[5] Where two deeds of different dates are simultaneously recorded, the one bearing the earlier date takes precedence.[6] But where two deeds were filed, one immediately succeeding the other, and

[1] Martin v. Williams, 27 Ga. 406; Turner v. Tyson, 49 Ga. 165; Roe v. Mound, 48 Ga. 461. In New Jersey, a deed not recorded in fifteen days is void as to a subsequent deed for a valuable consideration without notice and cannot regain its priority by being placed on record before such subsequent deed is recorded. Such subsequent deed cannot lose its priority over the earlier deed by not being put on record, but is, in its turn, if not recorded in fifteen days, subject to be postponed to a later deed taken without notice. Sanborn v. Adair, 29 N. J. Eq. 338.

[2] Greenl. Cruise Dig. 445; Northrup v. Brehmer, 8 Ohio, 392; Lightner v. Mooney, 10 Watts, 407; Sander v. Morrow, 33 Pa. St. 83.

[3] Mallory v. Stodder, 6 Ala. 801; Dubose v. Young, 10 Ala. 365; Harrold v. Simonds, 9 Mo. 326; Davis v. Ownsby, 14 Mo. 170; McCabe v. Grey, 20 Cal. 509; Kesler v. State, 24 Ind. 315; Nicholds v. Reynolds, 1 R. I. 30; Gill v. Fountleroy, 8 B. Mon. 177; Biglow v. Topliff, 25 Vt. 274, 285; Horsley v. Garth, 2 Gratt. 471.

[4] Cook v. Hall, 6 Ill. 575; Oats v. Walls, 28 Ark. 244. The recordation of a deed by a clerk of a county court, who continued to exercise his office after the State had passed the ordinance of secession, held valid. Henning v. Fisher, 6 W. Va. 638. Deed left with register with instructions not to record until notified does not afford constructive notice of its contents. Haworth v. Taylor, 108 Ill. 275.

[5] Bussing v. Crain, 8 B. Mon. 593.

[6] Deininger v. McConnel, 41 Ill. 228; Stebbins v. Duncan, 108 U. S. 32.

they were recorded in that order, preference was given to the one first filed and recorded.[1]

§ 275. **Proof of the Date of Filing.**—The order in which deeds are entered upon the record is not evidence to show which was first received, nor is parol evidence admissible.[2] The certificate of the clerk as to the time when a deed was deposited for record is conclusive.[3] But in Virginia, the court held that the true date of registration might be shown by parol testimony.[4] And this seems to be conceded in Vermont, though it was held that, in the absence of proof as to the time when an instrument was in fact recorded, the legal presumption is that it was recorded when received for record.[5]

§ 276. **To whom the Record is Notice.**—As a general proposition, the effect of registration is to give notice of the existence and contents of the deed to all persons who deal with, or on credit of the title conveyed. The record of a deed, to which a purchaser would not be directed by a careful examination of his vendor's title, does not affect him with notice.[6] The language of the court of Pennsylvania in one case is: "That the record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it. Strangers to the title are in no way affected by the record."[7] As stated in another case, "a purchaser has not by law constructive notice of

[1] Brookfield v. Goodrich, 32 Ill. 363, where two deeds of trust were executed on the same property to the same trustee, to secure two different classes of bonds in the hands of different holders, the holders of the bonds, not the trustee, will be regarded as the purchasers to be protected by the recording laws. The presumtion, in the absence of proof to the contrary, is that the deeds were filed in the order in which they were handed to the recorder, as it was his duty to do.

[2] Hatch v. Hoskins, 17 Me. 391.

[3] Bubose v. Young, 10 Ala. 365. See Parsons v. Boyd, 20 Ala. 112.

[4] Horsley v. Garth, 2 Gratt. 471.

[5] Wing v. Hall, 47 Vt. 182.

[6] Leiby v. Wolf, 10 Ohio, 83. Compare Godfroy v. Disbrow, Walk. (Mich.) 260.

[7] Maul v. Rider, 59 Pa. St. 167.

all matters appearing of record; but only of such facts, relating to the same land, as appear upon or are referred to by the muniments of title which it was necessary for him to examine, in order to ascertain the sufficiency of such title."[1]

§ 277. **Of what Facts the Record is Notice.**—Where, in a recorded deed, reference was made to another deed, also on record, in which it was stated that the trees growing upon the land had been sold, it was held to be a notice of such sale, although the deed by which they were conveyed was not itself upon record.[2] So, a reference in a mortgage to a prior unrecorded mortgage, was held to charge the second mortgage with notice of the first mortgage.[3] And where a deed, duly recorded, conveyed the lands, subject to the rights of a third person as assignee of rents, it was held to be constructive notice to the purchaser, and all persons claiming under him, of the rights of such assignee, although the assignment to him was not on record.[4] The rule is that a grantee always takes with constructive notice of whatever appears in the conveyances constituting his chain of title.[5] And whatever is sufficient to put him on inquiry, is sufficient to charge him with notice of whatever an ordinarily diligent search would have disclosed.[6] Therefore, all deeds referred to as being in any way connected with the title, as well as those upon which

[1] Dexter v. Harris, 2 Mason, 531.

[2] White v. Foster, 102 Mass. 375.

[3] Baker v. Mather, 25 Mich. 51. See Bell v. Twilight, 18 N. H. 159.

[4] Childs v. Clark, 3 Barb. Ch. 52.

[5] Gibert v. Peteler, 38 Barb. 488, where the deed referred to another of the same estate, in which were contained restrictive covenants as to the manner of using the estate. And see Jacques v. Short, 20 Barb. 269; Sigourney v. Munn, 7 Conn. 324; Anderson v. Layton, 3 Bush (Ky.), 87. The record of a trust deed is not constructive notice, except in relation to the property conveyed therein. It is not, of itself, notice as to property purchased by the trustee with the proceeds of that property. Bazemore v. Davis, 55 Ga. 504.

[6] Greenl. Cruis. Dig. 452, note; Acer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Hamilton v. Nutt, 34 Conn. 501; Baker v. Mather, 25 Mich. 53. See *ante*, § 271.

the title is based, must be examined as to any facts which they may contain, at the purchaser's peril.

§ 278. **Deeds Disconnected from the Chain of Title.**— The record of a deed is notice to those only who claim the title through, or under the same grantor. It would not be notice to persons claiming title under a different source.[1] Nor to a grantor in a deed already on record, of acts done by his grantor subsequent to the recording of the first deed.[2] And, in many of the States, a purchaser is not bound to take notice of the record of a deed made by a grantee of the same grantor, if the deed by which the grantee claimed is not on record, so as to complete the chain of title.[3] Upon this principle it has been held, that the recording of a deed made by an attorney in fact does not operate as constructive notice, unless the power of attorney under which it is made is recorded.[4] And if a vendee makes a mortgage to his vendor, who puts it on record, it is no notice of the vendee's deed from the vendor, which is not recorded, as against a second purchaser from such vendor.[5] But in New York, a deed reciting the power of attorney by virtue of which it was executed, which was duly deposited for record, was held to be sufficient notice of the power, to a subsequent purchaser, who was equally affected by it as if the power had been deposited.[6] And in Texas it seems not

[1] Long v. Dollarhide, 24 Cal. 218; Tilton v. Hunter, 24 Me. 29; Crockett v. Maguire, 10 Mo. 34; Losey v. Simpson, 11 N. J. Eq. 246; Embury v. Conner, 2 Sandf. 98; Pierce v. Turner, 5 Cranch, 154; Rodgers v. Burchard, 34 Tex. 441; Corbin v. Sullivan, 47 Ind. 356; Rankin v. Miller, 43 Iowa, 11.

[2] George v. Wood, 9 Allen, 80. See Roe v. Neal, Dudley (Ga.), 168; Whittington v. Wright, 9 Ga. 23.

[3] St. John v. Conger, 40 Ill. 535; Fenno v. Sayre, 3 Ala. 458; Losey v. Simpson, 11 N. J. Eq. 246; Ely v. Wilcox, 20 Wis. 523; Page v. Waring, 76 N. Y. 472.

[4] Graves v. Ward, 2 Duv. (Ky.) 301. Notice in fact of a deed may operate availably in equity, though the power of attorney under which the deed was made was not deposited with the deed for registration. Stewart v. Hall, 3 B. Mon. 218. The power must accompany the grant upon the records. Oatman v. Fowler, 43 Vt. 462.

[5] Losey v. Simpson, 11 N. J. Eq. 246.

[6] Jackson v. Neely, 10 Johns. 374.

to be necessary, in order to give effect to registry, that the record should contain a complete chain of title. A single deed is notice of what it contains.[1]

§ 279. **Notice from Any Other Source Equivalent to Record.**—Notice, brought home to subsequent purchaser or mortgagee from any other source, has the same effect as registration. It is to be remembered that, as a general rule, registration has nothing to do with passing the title. It simply operates as notice that the transfer has been made. In a few instances statutes have been enacted, requiring deeds made by married women to be recorded in order to be valid and operative.[2] And in some States, an unrecorded deed is not valid as against creditors, though known to them, while it would be as to subsequent purchasers.[3] But with these exceptions, it may be stated as a general proposition, that actual notice of an unrecorded deed, or the constructive notice given by possession of the land, has the same effect as the record of such deed duly made would have.[4] As between the parties to a deed, and their heirs, no notice is necessary, as they are presumed to have known the contents of the instrument. The cases sustaining these propositions are very numerous: only a few of them are cited.[5]

[1] Vaughan v. Greer, 38 Tex. 530.

[2] Hillegas v. Hartley, 1 Hill (S. C.), Ch. 106.

[3] Edwards v. Brinker, 9 Dana, 69; Guerrant v. Anderson, 4 Rand. 208; Lillard v. Rucker, 9 Yerg. 73. And see Morse v. Wright, 60 Cal. 260.

[4] Smith v. Hall, 28 Vt. 364; Jackson v. Page, 4 Wend. 585; Jackson v. Elston, 12 Johns. 452; Wells v. Morrow, 38 Ala. 125; Mathews v. Demeritt, 22 Me. 312; Rogers v. Jones, 8 N. H. 264; Brown v. Manter, 22 N. H. 468; Ellison v. Wilson, 36 Vt. 687; Speer v. Evans, 47 Pa. St. 144; Mills v. Smith, 8 Wall. 27; Goodenough v. Warren, 5 Sawyer, 495; Hill v. Murray, 56 Vt. 177; Cox v. Wayt, 26 W. Va. 807. There is no difference in legal effect between legal and constructive notice. Schutt v. Large, 6 Barb. 373; Stuyvesant v. Hall, 2 Barb. Ch. 151. But see, as to North and South Carolina, note to § 273.

[5] Maupin v. Emmons, 47 Mo. 304; Musgrove v. Bonser, 5 Oreg. 313; McCamant v. Patterson, 39 Mo. 100; Sidle v. Maxwell, 4 Ohio St. 236; Center v. The P. & M. Bank, 22 Ala. 743; Bell v. Evans, 10 Iowa, 353; Barrett v. Barrett, 31 Tex. 348.

§ 280. **Of Possession as Notice.**—In some of the States, open and visible possession of the premises by the grantee in a deed is held to be constructive notice of the existence of the deed.[1] In other States, while possession under an unrecorded deed is not, as a matter of law, notice of the deed, equivalent to registration, it is evidence from which notice may be inferred,[2] even as against the claims of a subsequent grantee whose deed has been put on record.[3] To imply notice, the possession must be open, visible and unambiguous, such as is not liable to be misunderstood or misconstrued.[4] When the possession is consistent with the record title, no inference is to be drawn from it.[5] Thus, where one holds, and is in possession of certain rights in a tract of land by a deed which is recorded, and has certain other rights by deed not recorded, his possession will not be notice of a title or claim beyond what he holds under a

[1] McKaskle v. Amarine, 12 Ala. 17; Watkins v. Edwards, 23 Tex. 443; Russell v. Sweezey, 22 Mich. 239; Landers v. Bolton, 26 Cal. 393; Hunter v. Watson, 12 Cal. 363; Fair v. Stevenot, 29 Cal. 486; Griswold v. Smith, 10 Vt. 452; Weld v. Madden, 2 Cliff. 584; Watrous v. Blair, 32 Iowa, 63; Taylor v. Lowenstein, 50 Miss. 278; Phillips v. Pitts, 78 Ill. 72; Tucker v. Vandermark, 21 Kan. 263. Whether the possession of the grantee under an unrecorded deed is of such a character as to amount to constructive notice, is a question for the jury. Ponton v. Ballard, 24 Tex. 619.

[2] Vaughn v. Tracy, 22 Mo. 415; *s. c.*, 25 Mo. 318; Landes v. Brant, 10 How. 348; Rogers v. Jones, 8 N. H. 264; Moore v. Jordan, 14 La. Ann. 414; Nutting v. Herbert, 37 N. H. 346; Preston v. Nash, 76 Va. 1. Under the statute of Massachusetts, evidence of open occupation, possession and cultivation, was held not to warrant the inference that a subsequent purchaser had notice of a prior deed to the party in possession. Pomroy v. Stevens, 11 Mete. 244; Mara v. Pierce, 9 Gray, 306; Dooley v. Wolcott, 4 Allen, 406.

[3] Cabeen v. Breckenridge, 48 Ill. 91.

[4] Coleman v. Barklew, 27 N. J. L. 357; Holmes v. Stout, 10 N. J. Eq. 419; Bell v. Twilight, 22 N. H. 500. But actual possession of real estate under an unrecorded deed, although the improvements are not valuable, is sufficient notice to a subsequent purchaser of the occupant's interest and title, either at private or judicial sale. Taylor v. Lowenstein, 50 Miss. 278; Phillips v. Pitts, 78 Ill. 72.

[5] Smith v. Yule, 31 Cal. 180; Fair v. Stevenot, 29 Cal. 486; Trusdale v. Ford, 37 Ill. 210; Emmons v. Murray, 16 N. H. 398; Ely v. Wilcox, 20 Wis. 531; Colby v. Kenniston, 4 N. H. 262; Patten v. Moore, 32 N. H. 384.

former deed.[1] And where a party had been in possession for some length of time without any title, and upon receiving one, continued in as before, without any change in the mode and character of his occupancy, it was held not sufficient notice to break in upon the registry law.[2] So, where the grantee in an unrecorded deed enters and occupies the premises in connection with his grantor, it is no notice of the conveyance.[3] As a deduction from the authorities it may be stated, as a general proposition, that possession, to have the effect of notice, must be exclusive, open and notorious.[4]

§ 281. **As to what Facts and Circumstances, or Degree of Knowledge will Constitute Actual Notice,** the authorities are not entirely agreed. The language of the court of Maine in one case is as follows: "The actual notice under the statute of the State, which will prevent the grantee in a subsequent recorded deed from taking precedence of the grantee in a prior unrecorded one, should be so express and satisfactory, that it would be fraud on the part of such a grantee to purchase, attach, or levy on the land, to the prejudice of the first purchaser."[5] Such has been the effect of statutory provisions in many cases.[6] But, generally,

[1] Great Falls Co. v. Worster, 15 N. H. 412.

[2] Emmons v. Murray, 16 N. H. 398.

[3] Butler v. Stevens, 26 Me. 484. See Bell v. Twilight, 22 N. H. 500.

[4] Smith v. Yule, 31 Cal. 184; Billington v. Welsh, 5 Binn. 132; Fair v. Stevenot, 29 Cal. 486. And see Boggs v. Anderson, 50 Me. 161; Cabeen v. Breckenridge, 48 Ill. 91; Page v. Waring, 76 N. Y. 463. As to party setting up a claim to real estate under an unrecorded deed from a near relative. Clark v. Morris, 22 Ill. 434. Premises occupied by third party. Weld v. Madden, 2 Cliff. 584; Ehle v. Brown, 31 Wis. 405; Smith v. Yule, 31 Cal. 180. Possession of land by a grantor is no notice of any rights in him, to one who acquires an interest in the land on the faith of his recorded conveyance. Bloomer v. Henderson, 8 Mich. 395. Possession of a part of the premises under the occupant held not to be notice. Bogue v. Williams, 48 Ill. 371.

[5] Porter v. Sevey, 43 Me. 519. The provisions of Rev. Stat. 1841, changed the former law, so that only *actual notice* of an unrecorded deed to a subsequent purchaser will postpone the latter to the former. Spofford v. Weston, 29 Me. 140; Rich v. Roberts, 48 Me. 548; Hanley v. Morse, 32 Me. 287.

[6] Notice which puts the purchaser on inquiry merely, is not sufficient.

whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of others, and enable him to ascertain their nature by inquiry, will be sufficient to charge him with knowledge of all facts which an inquiry, suggested by such information, prosecuted with due diligence, would have disclosed to him.[1] When he has knowledge of any fact sufficient to put him on inquiry, he is presumed to have made the inquiry, and ascertained the extent of the rights he may possibly prejudice, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser.[2] But the knowledge must have a reasonable certainty as to time, place and circumstances,[3] and must be such as would naturally put a prudent man upon inquiry in a direction where he might learn the actual facts.[4] And a purchaser may meet this by showing that he made diligent but ineffectual inquiry.[5]

Dey v. Dunham, 2 Johns. Ch. 182. Such notice must not merely be a probable, but a necessary and unquestionable inference from the facts proved. McMechan v. Griffing, 3 Pick. 149. It must be sufficient to charge the latter purchaser with fraud, or must be clearly proved. Emmons v. Murray, 16 N. H. 385. It must be such notice as affects the conscience. Mundy v. Vawter, 3 Gratt. 518; Barrett v. Barrett, 31 Tex. 344.

[1] Bump on Fraud. Conv., p. 478; Williamson v. Brown, 15 N. Y. 362; Martel v. Somers, 26 Tex. 351; Wilson v. Hunter, 30 Ind. 472; Hankinson v. Borbour, 29 Ill. 80; Sigourney v. Munn, 7 Conn. 324; Partridge v. Smith, 2 Biss. 183; Muldrow v. Robinson, 58 Mo. 331; Heaton v. Prather, 84 Ill. 330.

[2] Baker v. Bliss, 39 N. Y. 70; Hook v. Mowre, 17 Iowa, 195.

[3] Parks v. Willard, 1 Tex. 350. The notice of a deed, which is necessary to stand in the place of recording, although not necessarily a knowledge of its entire contents, must be an explicit notice of its existence. It must be notice that a deed conveying the property has been executed, and that the title has passed out of the grantor. Wallace v. Craps, 3 Strobh. (S. C.) 266. It is sufficient that he had information of the substance of the transaction, or such as would lead him to actual knowledge. Harper v. Reno, 1 Freem. Ch. 323. Such information must be sufficiently definite to enable him to ascertain whether it be authentic. Massie v. Greenhow, 2 Patt. & H. (Va.) 255. See Spofford v. Weston, 29 Me. 140; Nute v. Nute, 41 N. H. 60; Parker v. Kane, 4 Wis. 1.

[4] Hart v. Farmers, etc. Bank, 33 Vt. 252; Mills v. Smith, 8 Wall. 27; Barrett v. Barrett, 31 Tex. 344. Such notice as men usually act upon in the ordinary affairs of life. Curtis v. Mundy, 3 Metc. 405.

[5] Fair v. Stevenot, 29 Cal. 490; Lestrade v. Barth, 19 Cal. 676.

The following instances may serve to illustrate some of these principles. In California, where a deed was filed in the recorder's office for record, but before it was recorded it was withdrawn by the grantee, and after some time returned for record, it was held, that during the time the deed was away from the office, the law making the filing of a deed for record notice to subsequent purchasers, was suspended; but that a statement of the fact of the filing and withdrawal of the deed was sufficient to put upon inquiry a third party who proposed to purchase the property.[1] And where a deed was filed for record misdescribing the premises—the numbers of the township and range having been transposed—but there being in the county no premises corresponding to the description in the deed, it was held sufficient notice to put a purchaser upon inquiry and charge him with knowledge that the premises had been conveyed.[2] So a purchaser was held to be affected with notice of a prior unrecorded deed, by having heard the grantee in such deed say that he had the same.[3] And the notice was held effectual where the information was derived from a person interested, and from a source likely to give credit, although not the party or his agent.[4] But where there was nothing to put the purchaser upon inquiry further than a remark by a third party, that there was "some trouble about the title," this was held no sufficient notice of the existing equities.[5] Even a gen-

[1] Lawton v. Gordon, 37 Cal. 202. But see Hickman v. Perrin, 6 Coldw. (Tenn.) 135, where it was held, under circumstances substantially similar, that the noting of a deed which is withdrawn before the registration, by the party taking a beneficial interest under it, gives it no priority. The register is required by law, to spread upon his books, deeds, in the order, in which they are filed, and the noting in his books is the evidence of the filing; but if the deed is withdrawn before registration, by the party or his agent, its priority is gone, and it only takes effect from the date of the return of the deed into the office of the register.

[2] Partridge v. Smith, 2 Biss. 183. And see Muldrow v. Robison, 58 Mo. 331.

[3] Mense v. McLean, 13 Mo. 298. And see Hewitt v. Clark, 91 Ill. 605.

[4] Mulliken v. Graham, 72 Pa. St. 484; Butcher v. Yocum, 61 *Id.* 168. But the vague report of a stranger will not have the effect of notice. Kerns v. Swope, 2 Watts, 75; Jaques v. Weeks, 7 Watts, 261.

[5] Pittman v. Sotley, 64 Ill. 155. Generally, such notice, to be binding,

eral rumor of a conveyance may not be sufficient to put a party upon inquiry.[1] Knowledge on the part of a grantee in a subsequent deed, that there are upon record conveyances of the land, the title to which is in dispute, made by parties who cannot show by the record any title in themselves derived from the former actual owner, no conveyance from him appearing therein, is not such actual notice of a prior unregistered deed as will defeat his title.[2] And in Maine, where the declarations of the subsequent purchaser showed both his disbelief that any prior deed of the premises had been given by his grantor, and his knowledge of the claim of the parties professing to hold under such a deed, it was held that these facts did not warrant the conclusion that he had actual notice of the existence of the deed.[3] Where the owner of the land, upon giving a mortgage of it, exhibited to the mortgagee a prior mortgage deed, duly executed and delivered, which had been returned to the grantor for the purpose of being acknowledged by him, and the grantor declared at the time he exhibited the same that it had never been delivered, and there was no other evidence of notice, it was held that the mortgagee who first recorded his deed had the better title.[4] But a purchaser, with actual knowledge of a prior, adverse but unattested conveyance, which his counsel erroneously told him was void, was held to take subject to the rights of the grantee therein named.[5]

§ 282. **Notice to the Agent is Notice to the Principal.**

must proceed from some person interested in the property. Rogers v. Hoskins, 14 Ga. 166; Lamont v. Stimson, 5 Wis. 443; Peebles v. Reading, 8 S. & R. 496. But see Mulliken v. Graham, 72 Pa. St. 484; Curtis v. Mundy, 3 Metc. 407.

[1] Maul v. Rider, 59 Pa. St. 167; James v. Drake, 3 Sneed (Tenn.), 340; Jolland v. Stainbridge, 3 Ves. 478; Jaques v. Weeks, 7 Watts (Pa.), 267; Wilson v. McCullough, 11 Pa. St. 440. And see Butler v. Stevens, 26 Me. 484; Doyle v. Teas, 4 Scam. (Ill.) 202.

[2] Spofford v. Weston, 29 Me. 140.

[3] *Ibid.*

[4] Rogers v. Jones, 8 N. H. 264.

[5] Gilbert v. Jess, 31 Wis. 110.

—Notice of a prior unregistered deed to an agent or attorney employed to effect the purchase, is equivalent to notice to the principal.[1] And actual notice to one member of a corporation was held to be notice to all.[2] But notice to a husband of a prior unregistered mortgage, at the time of receiving a conveyance of lands to himself and his wife, was held not to operate as notice to the wife, so as to give the mortgage a preference in respect to her title, she having paid the consideration out of her separate estate.[3]

§ 283. **As to the Degree of Proof Required to Establish Actual Notice.**—In some of the States it is a construction of equity as well as law, that the taking of a deed, with knowledge of a prior unrecorded conveyance to another person, is a fraud upon him; and that the party relying upon an unregistered deed against a subsequent purchaser, must prove that the latter had actual notice of such deed.[4] And some of the cases seem to go to the extent that such notice must be proved beyond a reasonable doubt.[5] But in other States the jury has a right to infer such knowledge from any facts that would naturally suggest it.[6] In Missouri, the courts hold that the "actual notice," required by the statute, is used in contradistinction to the construct-

[1] Gilbert v. Jess, 31 Wis. 110; Polk v. Cosgrove, 4 Biss. 437; Goodenough v. Warren, 5 Sawyer, 494; Fuller v. Bennett, 2 Hare, 394; Hovey v. Blanchard, 13 N. H. 145; Williamson v. Brown, 15 N. Y. 359; Bank of U. S. v. Davis, 2 Hill (N. Y.), 451. Constant v. University of Rochester (N. Y.), 28 Cent. L. J. 274. Such notice, to bind the principal, must be brought home to the agent while engaged in the business and negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter. Pringle v. Dunn, 37 Wis. 449; May v. Borel, 12 Cal. 91; Fry v. Sheehee, 55 Ga. 208; Haywood v. Shaw, 16 How. (N. Y.) Pr. 119.

[2] Watson v. Wells, 5 Conn. 468. The rule does not apply, however, when the member deals with the company as a third party on his own behalf. La Farge Fire Ins. Co. v. Bell, 22 Barb. (N. Y.) 54, 61.

[3] Sponable v. Snyder, 7 Hill (N. Y.), 427.

[4] Bush v. Golden, 17 Conn. 594; Pomroy v. Stevens, 11 Metc. 244; Spofford v. Weston, 29 Me. 140; Butler v. Stevens, 26 Me. 484; Stone v. Bartlett, 46 Me. 438.

[5] Rogers v. Wiley, 14 Ill. 65; McMechan v. Griffing, 3 Pick. 149.

[6] Maupin v. Emmons, 47 Mo. 304; Smith v. Lambeth, 15 La. Ann. 566.

ive notice given by a record; that it does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed; but that this may be proved, like any other fact, by any proper evidence, direct or circumstantial, tending to prove such knowledge, or any fact or circumstance that would put a man of ordinary circumspection upon inquiry.[1] Notice is actual where the purchaser knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them.[2] And if a purchaser knew that his grantor had made a prior conveyance, it will not avail him anything that he did not know what kind of a deed he had made.[3] So where one, when he purchases, knows that his grantor has no title, he cannot set up his deed against the real owner, although he did not know who he was when he took his deed.[4]

§ 284. **An Unrecorded Deed is Void, when.**—The statutes of all the States render deeds, that have not been recorded within the time prescribed by law, void, as against subsequent *bona fide* purchasers for valuable consideration, without notice. And it is presumed, that in the absence of any statute upon the subject, the negligence of a grantee in not recording his deed when required by law, would estop him from setting it up against a purchaser.[5] But to prevail against a prior purchaser, even where the second had no notice of the first conveyance, he must have paid a good and valuable consideration.[6] The payment of the consideration raises the equity that invalidates the first

[1] Manpin v. Emmons, 47 Mo. 304.

[2] Speck v. Riggin, 40 Mo. 405.

[3] Galland v. Jackman, 26 Cal. 87.

[4] Fitzhugh v. Barnard, 12 Mich. 110.

[5] 1 Prest. Abst., Tit. 24; Preston v. Nash, 76 Va. 1.

[6] Paul v. Fulton, 25 Mo. 156; Aubuchon v. Bender, 44 Mo. 560; Nolen v. Gwyn, 16 Ala. 725; Wormley v. Wormley, 8 Wheat. 449; Wallace v. Moody, 26 Cal. 387; Shotwell v. Harrison, 22 Mich. 410; Frey v. Clifford, 44 Cal. 335; Coon v. Browning, 10 Kan. 85; Hutchinson v. Hartman, 15 Kan. 133, and it is incumbent on him to prove payment: the recitals in his deed are not sufficient.

deed.[1] Therefore, to acquire precedence as a *bona fide* purchaser, he must not only not have notice of the prior title when he purchases, but when he pays the consideration also.[2] It seems that in several of the States, a subsequent *bona fide* purchaser, in order to be entitled to the protection of the statute, must not only have purchased without notice, and upon a valuable consideration, but must also have recorded his deed before that of a prior purchaser.[3]

§ 285. **Of Purchasers by Quitclaim Deed.**—In some of the States it is held, that a purchaser by quitclaim deed cannot be a purchaser without notice: that he takes only such interest as the grantor may lawfully convey, and, therefore, cannot acquire any rights that the grantor did not have in the premises.[4] But in other States, the grantee in a quitclaim deed which is recorded, will take precedence of one claiming under an unrecorded prior deed, of which the former had no notice.[5] In support of the first proposition,

[1] Paul v. Fulton, 25 Mo. 156; Aubuchon v. Bender, 44 Mo. 560; Maupin v. Emmons, 47 Mo. 304. As against volunteers, all the grantor's title passes to the grantee, though not recorded. Snodgrass v. Ricketts, 13 Cal. 359. A voluntary conveyance, though not recorded, is valid against any subsequent voluntary conveyance of the same land by the grantor. Way v. Lyon, 3 Blackf. 76.

[2] Blanchard v. Tyler, 12 Mich. 339; Harper v. Reno, 1 Freem. Ch. 323; Bennett v. Titherington, 6 Bush, 192; Paul v. Fulton, 25 Mo. 156. And a purchaser must not only have paid the consideration, but have obtained the conveyance before notice. Blight v. Banks, 6 T. B. Mon. 192.

[3] Wisconsin Rev. Stats. 1878, § 2241; Michigan Comp. Laws, 1871, § 4231; Rodgers v. Burchard, 34 Tex. 441; Fallass v. Pierce, 30 Wis. 443. Otherwise, under the statute of Illinois, Rev. Stat. Ill., 1877, chap. 30, § 3. And see Galway v. Malchow, 7 Neb. 285; McFadden v. Worthington, 45 Ill. 362. In a conveyance the absolute title rests with the grantor and his heirs, in abeyance, to vest irrevocably upon the record of the deed; and it will vest in the first grantee in condition to receive the grant, who shall first place his deed upon record. Youngblood v. Vastine, 46 Mo. 239.

[4] Marshall v. Roberts, 18 Minn. 405; Rodgers v. Burchard, 34 Texas, 441. But this rule has been changed by statute in Minnesota. Strong v. Lynn, 37 N. W. Rep. 448. And see De Vaux v. Fosbender, 57 Mich. 579.

[5] Pittingill v. Devin, 35 Iowa, 354; Doe v. Reed, 5 Ill. 117; Graff v. Middleton, 43 Cal. 341; Fash v. Blake, 38 Ill. 363; Cutler v. James, 64 Wis. 173; Chapman v. Simms, 53 Wis. 154; Fox v. Hall, 74 Mo. 315;

it is argued that the grantor only conveys or undertakes to convey what interest he has in the premises, and that this is presumptive notice to a purchaser of all existing rights and equities in others. But on the other hand it may be said, that a quitclaim deed is the usual form used for a conveyance without covenants, and as the covenants in a deed are no part of the conveyance, no reason is perceived why a purchaser should not be allowed to deal with one who prefers not to enter into any covenants, on the same terms as with one who does covenant. An owner of real estate may have abundant reasons for not wishing to assume obligations in respect to it, although he may not be aware of any defect in his title. Whatever may be the form of the conveyance, he cannot convey any more title than he has in the premises. The principle by which a subsequent purchaser, without notice of a prior conveyance by his grantor, acquires title is, that the prior purchaser is estopped from asserting a title of which he has given no notice. We have heretofore expressed the opinion that, upon principle, it is entirely possible for a purchaser by quitclaim deed to be a *bona fide* purchaser, for valuable consideration, without notice.[1]

§ 286. **Continued.—As to the Rights of a Purchaser from an Heir.**—The same question has been raised as between a *bona fide* purchaser from an heir and one holding under a former unregistered deed from the ancestor. Some courts, holding the deed of the ancestor effectual to divest him of the title, maintain that he had no estate at his decease which could descend to his heir; and that the heir

Willingham v. Hardin, 75 Mo. 429; Brown v. Bamser Coal Co., 97 Ill. 254; Rowe v. Beckett, 30 Ind. 154; Groff v. Middleton, 43 Cal. 341. But see Oliver v. Piatt, 3 Howe, 333; May v. Leclaire, 11 Wall. 232; Springer v. Bartle, 46 Iowa, 688; Stoffel v. Schroder, 62 Mo. 147; Ridgeway v. Holliday, 59 Mo. 444; Stivers v. Home, 62 Mo. 473, where it is held that where one takes title to land, by quitclaim, which in the hands of the grantor, is subject to equities to which the recording act does not apply, the grantee will take the land subject to such equity.

[1] *Ante*, § 59. For a more ample and explicit statement of the reasons upon which this opinion is founded, see 12 Cent. L. J. 127, *et seq*. To the same effect see Chapman v. Sims, 53 Miss. 154.

never having any estate in the land, a deed from him could not take effect to defeat the title of the grantee of his ancestor.[1] But other courts, in the construction of the registry acts, hold that a purchaser from the heir, whose deed is recorded, will take precedence of the grantee of the ancestor whose deed is not recorded, on the ground that, under the statute, an unrecorded deed is void as to all persons except the parties to it, their heirs, and persons having actual notice of such deed;[2] and that *bona fide* purchasers for full consideration, without notice of fraud, are to be protected while relying upon the title as shown by the records.[3] "This construction of the statute seems to be more in accordance with the object and design to be accomplished by the law, and is within the reason which gave rise to its enactment. It is the object of recording acts to make patent the title to real estate, that purchasers may know what title they are acquiring. Where a deed is not recorded, the title, apparently, is still in the grantor, and the law authorizes purchasers, who are ignorant of the conveyance, to deal with him as the real owner. In case of his death the heir becomes the apparent owner of the legal title, and it is equally important and equally as just that the public may

[1] Rogers v. Burchard, 34 Tex. 441; Hill v. Meeker, 24 Conn. 211; Ralls v. Graham, 4 T. B. Mon. 120; Hancock v. Beverly, 6 B. Mon. 531; Harlan v. Seaton, 18 B. Mon. 312. The court, in the case last cited, say that if it were a new question "and had not been heretofore decided," they should be strongly inclined to give to the statute a liberal construction. They add, however, that as the previous decisions had become settled rules of property, it is better that the law should remain permanent, "although settled originally upon doubtful principles."

[2] Powers v. McFerran, 2 Serg. & R. 46; Vaughan v. Greer, 38 Tex. 530; Earle v. Fiske, 103 Mass. 491. The court in Massachusetts say: "It appears to us that the plain meaning of our system of registration is, that a purchaser of land has a right to rely upon the information furnished him by the registry of deeds; and in the absence of notice to the contrary, he is justified in taking that information as true, and acting upon it accordingly."

[3] Kennedy v. Northup, 15 Ill. 148; Youngblood v. Vastine, 46 Mo. 239; Stone v. Bartlett, 46 Me. 438; McCulloch v. Endaly, 3 Yerg. (Tenn.) 346.

be allowed to deal with him as with the original grantor if living."[1]

§ 287. **Continued.—Of Purchasers at Sheriff's Sale.**— Purchasers at sheriff's sale, as a general rule, are entitled to the benefit of the statute. In a few instances, the doctrine that the grantee under a transfer, which passes only the right title and interest of the execution debtor, takes the estate subject to all the equities with which it was bound in his hands, has been extended to sales under execution.[2] But the prevailing rule is, that the protection of a purchaser for a valuable consideration without notice, at sheriff's sale, is the same as that of any other purchaser,[3] and that the purchase dates from the sale.[4] In some of the States, a judgment or attaching creditor is not protected against an unrecorded deed.[5] In such States, if the deed

[1] Kennedy v. Northup, 15 Ill. 148. Purchasers are required to spread upon the record the evidence of their ownership, and if others suffer from their neglect, the law will not recognize their ownership. Youngblood v. Vastine, 46 Mo. 239.

[2] Kelly v. Mills, 41 Miss. 267, overruling Kilpatrick v. Kilpatrick, 23 Miss. 124. The evidence of a mere equitable title, need not be recorded to be valid against creditors and subsequent purchasers, as a sale on execution passes only the rights of the judgment debtor. Morgan v. Morgan, 3 Stew. (Ala.) 383.

[3] Ruynan v. McClellan, 24 Ind. 165; Evans v. McGlasson, 18 Iowa, 150; Fords v. Vance, 17 Iowa, 94; Savery v. Browning, 18 Iowa, 246; Waldo v. Russell, 5 Mo. 387; Davis v. Ownsby, 14 Mo. 170; Draper v. Bryson, 26 Mo. 108; Stilwell v. McDonald, 39 Mo. 282; Potter v. McDowell, 43 Mo. 93; Den v. Richman, 13 N. J. L. 43; Garwood v. Garwood, 9 N. J. L. 193; Scribner v. Lockwood, 9 Ohio, 184; Jackson v. Post, 15 Wend. 588; McNitt v. Turner, 16 Wall. 352. That an execution creditor has notice of an unrecorded mortgage, does not affect a purchaser at sheriff's sale, under the execution of the mortgaged land, such purchaser being without notice. Miles v. King, 5 S. C. 146.

[4] Ruynan v. McClellan, 24 Ind. 165; Davis v. Ownsby, 14 Mo. 170.

[5] Sappington v. Oeschli, 49 Mo. 244; Greenleaf v. Edes, 2 Minn. 264; Kelly v. Mills, 41 Miss. 267; Bell v. Evans, 10 Iowa, 353; Evans v. McGlasson, 18 Iowa, 150; Boze v. Arper, 6 Minn. 220. Actual notice before judgment has the same effect. Churchill v. Morse, 23 Iowa, 229; Hoy v. Allen, 27 Iowa, 208; Vreeland v. Claflin, 24 N. J. Eq. 313. And see Davie v. McDaniel, 47 Ga. 195; Lamberton v. Merchants' Bank, 24 Minn. 281.

be recorded before sale under the execution, it is valid, as against the execution purchaser.[1]

But in other States, the statutes have been construed to extend to the protection of the lien of a judgment or an attachment, as against such prior unrecorded deed.[2] The mortgagee in a mortgage given to secure a pre-existing debt,[3] and purchasers at mortgage sales, have also been held to be purchasers for a valuable consideration, and as such protected under the statute, against prior unrecorded deeds, of which they had no notice.[4]

§ 288. **Equity Extinguished by a Purchase without Notice.**—One who purchases without notice, from a subsequent purchaser with notice of a prior unrecorded deed, is not affected by it, and will take a title cured of the fraud.[5] So a purchaser without notice, may convey a good title to

[1] Schroeder v. Gurney, 73 N. Y. 430. Even if the latter is without proper acknowledgment. Hoy v. Allen, 27 Iowa, 208.

[2] Pollard v. Cocke, 19 Ala. 188; McCoy v. Rhodes, 11 How. 131; Hall v. Paul, 8 Miss. 479; Reichert v. McClure, 23 Ill. 516; Massey v. Westcott, 40 Ill. 160; McFadden v. Worthington, 45 Ill. 362; Vreeland v. Claflin, 24 N. J. Eq. 313; Humphreys v. Merrill, 52 Miss. 92. Actual notice after judgment is obtained, does not defeat the judgment creditor. Loughridge v. Bowland, 52 Miss. 546. A deed executed before a judgment is recovered against the grantor, but which is not recorded until after the judgment is docketed, is good as against a sheriff's deed, made on the judgment, if recorded before the record of the sheriff's deed. Wilcoxson v. Miller, 49 Cal. 194. In Minnesota, an attachment or judgment does not take precedence of a prior unrecorded conveyance of real estate, if the attachment or judgment creditor has notice of such unrecorded conveyance at the time of levying his attachment, or docketing his judgment. Lamberton v. Merchants' Nat. Bank, 24 Minn. 281.

[3] Frey v. Clifford, 44 Cal. 335.

[4] Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866. The word "subsequent purchaser," means a purchaser of the estate embraced in the unrecorded conveyance, or some interest therein. Campbell v. Vedder, 1 Abb. (N. Y.) App. Dec. 295.

[5] Mallory v. Stodder, 6 Ala. 801; Fenno v. Sayre, 3 Ala. 458; Truluck v. Peoples, 3 Ga. 446; Lee v. Cato, 27 Ga. 637; Pierce v. Faunce, 47 Me. 507; Brackett v. Riddon, 54 Me. 126; Connecticut v. Bradish, 14 Mass. 296; Trull v. Bigelow, 16 Mass. 406; Coffin v. Ray, 1 Metc. 212; Cushing v. Hurd, 4 Pick. 252; Jackson v. Walsh, 14 Johns. 407; Wood v. Chapin, 13 N. Y. 509; Morrison v. Shattuck, 1 N. Chip. (Vt.) 34; Lacy v. Wilson, 4 Munf. (Va.) 313.

one with notice. After an interest in real estate has passed to an innocent purchaser and is discharged of its latent equities, it is thenceforth unimportant whether subsequent grantees or assignees had, or had not notice of the prior equitable claims,[1] or that the intermediate grantees paid nothing.[2] But a purchaser for a valuable consideration, from one having knowledge of a prior deed, cannot hold the land, if such prior deed be recorded before his own purchase, although the deed to his grantor be first recorded.[3]

§ 289. **Effect of a Mistake in the Record—Destruction of Record.**—Some courts in carrying out the idea, that the time when the record of a deed takes effect as notice has reference to the date of its being filed or deposited with the proper officer to be recorded,[4] hold, that after a deed is filed, it is, in contemplation of law, recorded; that the grantee in it has done all the law requires, and his rights will be protected, even though the recorder actually records only a portion of it, or fails to record it at all.[5] But other courts hold, that the record of a deed, filed in the recorder's office of a county, imparts notice only of what is spread upon the record; and if a mistake is made in copying the

[1] Pierce v. Faunce, 47 Me. 507; Trull v. Bigelow, 16 Mass. 406; Bell v. Twilight, 18 N. H. 159; Shotwell v. Harrison, 22 Mich. 410.

[2] Fallass v. Pierce, 30 Wis. 443.

[3] Van Rensselaer v. Clark, 17 Wend. 25. See Adams v. Cuddy, 13 Pick. 464; Flynt v. Arnold, 2 Metc. 619, 627; Mahoney v. Middleton, 41 Cal. 41; Shotwell v. Harrison, 22 Mich. 410.

[4] Nichols v. Reynolds, 1 R. I. 30; Dubose v. Young, 10 Ala. 365; Davis v. Ownsby, 14 Mo. 175; Kessler v. State, 24 Ind. 315; McCabe v. Grey, 20 Cal. 509; Gill v. Fauntleroy, 8 B. Mon. 177; Hine v. Robbins, 8 Conn. 347; Horsley v. Garth, 2 Gratt. 471.

[5] Kiser v. Heuston, 38 Ill. 252; Flowers v. Wilkes, 1 Swan. 408; Throckmorton v. Price, 28 Tex. 605; Merrick v. Wallace, 19 Ill. 486; Nichols v. Reynolds, 1 R. I. 30; Beverly v. Ellis, 1 Rand. (Va.) 102; Riggs v. Boylan, 4 Biss. 445; Oats v. Wall, 28 Ark. 244; Bank of Kentucky v. Haggin, 1 A. K. Marsh. 306; Polk v. Cosgrove, 4 Biss. 437; Lewis v. Hinman (Conn.), 13 Atl. Rep. 143. The record of a deed absolute in form but a mortgage in fact and recorded in the book of deeds, imparts notice of the grantee's interest as effectually as though it were recorded in the book of mortgages. Haseltine v. Espey, 13 Oreg. 301.

deed, the party filing the same must suffer, and not an innocent purchaser who has been misled by the mistake.[1]

The Supreme Court of Michigan say: "The recording laws cannot be made by equitable construction, to embrace cases not within them, or to give constructive notice of things the records do not show; and where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts."[2]

The obligation of giving the notice required by the statute, rests upon the party holding the title, and if his duty is imperfectly performed, he, and not an innocent purchaser, must suffer the consequences.[3]

But after a deed has been duly recorded, the partial or total destruction of the record book containing it does not affect the record as notice.[4]

§ 290. **Seal of Acknowledging Officer need not be Recorded.**—The impression of the seal of the officer who takes the acknowledgment of a deed, need not be recorded, nor is it essential that the record should contain any *locus sigilli* or scroll. The statement in the body of the certificate, that the seal is attached, is sufficient to raise the presumption that such was the fact.[5] And in Missouri, the

[1] Terrell v. Andrew County, 44 Mo. 309; Miller v. Bradford, 12 Iowa, 14; Lally v. Holland, 1 Swan (Tenn.), 396; Sanger v. Craigue, 10 Vt. 555; Beekman v. Frost, 18 Johns. 544; Frost v. Beekman, 1 Johns. Ch. 299; Jennings v. Wood, 20 Ohio, 261; Willet v. Overton, 2 Root (Conn.), 338; Brydon v. Campbell, 40 Md. 331; Simon v. Kaliske, 1 Sweeny (N. Y.), 304; Payne v. Pavey, 29 La. Ann. 116; Potter v. Dooley, 55 Vt. 512.

[2] Barnard v. Campau, 29 Mich. 162.

[3] Terrell v. Andrew County, 44 Mo. 309.

[4] Myers v. Buchanan, 46 Miss. 397; Steele v. Boone, 75 Ill. 457; Gammon v. Hodges, 73 Ill. 140; Heaton v. Prather, 84 Ill. 330; Curyea v. Berry, *Id.* 600; Armentrout v. Gibbons, 30 Gratt. 632; Fitch v. Boyer, 51 Tex. 336. And see Evans v. Templeton (Tex.), 6 S. W. Rep. 843.

[5] Geary v. Kansas City, 61 Mo. 378; Griffin v. Sheffield, 38 Miss. 359; Addis v. Graham, 88 Mo. 197; German Amer. Bank v. White (Minn.), 38 N. W. Rep. 361.

registration of a deed having no seal or scroll attached by the maker, nevertheless imparts notice.[1]

§ 291. **Whether the Record of a Deed is Notice until Indexed.**—In Iowa, Pennsylvania and Vermont, it has been held that a deed not properly indexed, as required by statute, is not constructive notice to subsequent purchasers.[2] But in most of the States it is held that a deed properly filed and copied on the record, is recorded within the meaning of the law, and imparts notice to subsequent purchasers, notwithstanding the failure of the officer to index it. "The index is no part of the record."[3] The court of Georgia, in commenting upon the subject, remarks that, "the index is the means furnished by the public to its citizens, for an easy reference to the books of the record. It is not for the benefit of the holder of the deed, but for the convenience of those who desire to examine the record. The ease or difficulty of finding what is on record is not a matter in which the owner of the deed is concerned."[4] The party who suffers through the neglect of the clerk to properly index a conveyance, must look to the clerk and his sureties for redress.[5]

§ 292. **Corrections and Alterations of the Record.**—A register who has made an incorrect registration of a deed,

[1] McClurg v. Phillips, 57 Mo. 214. And see Smith v. Dall, 13 Cal. 510.

[2] Speer v. Evans, 47 Pa. St. 144; Barney v. McCarty, 15 Iowa, 522; Whaley v. Small, 25 Iowa, 188; Sawyer v. Adams, 8 Vt. 172. But see Stockwell v. McHenry, 107 Pa. St. 237. If a recorder keeps a general index, and omits to index a deed in it, and thereby overlooks a deed regularly recorded and indexed in the proper book, his certificate renders him liable, notwithstanding the Pennsylvania act of 1827 only requires him to keep an index for each book. The duty of search is that of the officer, and not of the parties. Schell v. Stein, 76 Pa. St. 398.

[3] Bishop v. Schneider, 46 Mo. 472; Chatham v. Bradford, 50 Ga. 327; Musgrove v. Bonser, 5 Oreg. 313; Board, etc. v. Babcock, *Id.* 472; Bedford v. Tupper, 30 Hun, 174; Manegold v. Barlow, 61 Miss. 593; Amer. Emigrant Co. v. Call, 22 Fed. Rep. 765; Lee v. Birmingham, 30 Kan. 312; Perkins v. Story (Neb.), 36 N. W. Rep. 292.

[4] Chatham v. Bradford, 50 Ga. 327.

[5] Musgrove v. Bonser, 5 Oreg. 313; Sawyer v. Adams, 8 Vt. 172; Board, etc. v. Babcock, 5 Oreg. 472.

may correct it.[1] But a portion omitted by mistake, and interlined after a subsequent purchase in good faith, will not impart notice to such purchaser.[2]

The question, whether the second recording of a deed, which has once been incorrectly spread upon the record, is valid, unless provided for by statute, does not seem to have arisen. Until this mode of correcting a mistake in the record is sanctioned, either by the legislature or higher courts, the execution and registration of a new deed would seem to be the safer plan. In case of the second registration of the same deed, the question might arise as to which record imparted the notice, or which shall be presumed to be correct; and whether one who has made search and found the first record would be bound to continue his search until he finds the second, or whether being misled by the mistake, he would not be entitled to protection.

The court cannot require a recorder who has correctly copied a deed upon the record, as made and delivered, to alter the record to correspond to an alteration adjudged in an action to reform the deed. The proper course is to adjudge that a new deed be executed by the grantor, or by a commissioner, and this may be recorded and referred to, in the margin of the record of the old one.[3]

[1] Baldwin v. Marshall, 2 Humph. (Tenn.) 116. A deed is not vitiated by the omission of the name of one of the grantors in recording it. Garrard v. Davis, 53 Mo. 322.

[2] Chamberlain v. Bell, 7 Cal. 292.

[3] Toops v. Snyder, 47 Ind. 91.

TITLE II.—Leases.

CHAPTER V. Of Leases in General.
VI. The Formal Parts of a Lease.
VII. The Execution, Assignment and Determination of Leases.

CHAPTER V.—Of Leases in General.

ARTICLE I. Of the Different Species of Leases.
II. Whether a Lease or an Agreement for a Lease.
III. Of the Parties to a Lease.

ARTICLE I.

OF THE DIFFERENT SPECIES OF LEASES.

SECTION.
293. Definition of lease.
294. Modes of creating tenancies at common law.
295. Of the different kinds of leases.
296. Of an estate for life.
297. Of a term of years.

§ 293. **Definition of Leases.**—A lease is a contract for the possession and profits of land and tenements, whereby the relation of landlord and tenant is created between the parties thereto.[1] This relation may also arise by implica-

[1] Taylor's Landl. & Ten., § 14. In nearly all the States leases for term exceeding one year must be by deed. Stimson's Amer. Stat., § 1471.

tion or by the act or operation of law. But our purpose is to speak only of tenancies created by act of the parties, and through the medium of written leases.

§ 294. **Modes of Creating Tenancies at Common Law.**—There were three modes of creating tenancies by act of the parties, at common law, namely: by deed, by writing not under seal, and by parol.[1] The period for which parol leases are binding, is limited in all the States to a comparatively short time, and as they do not properly come within the scope of the present work, do not demand more than a passing notice. It may be observed, before proceeding, that where leases are entered into by deed, the same general principles apply in respect to the materials of which they may be composed, alterations and the like, as in case of purchase deeds, under which head these subjects have already been discussed.

§ 295. **Other Different Kinds of Leases.**—Leases are further distinguished as conveyances for life, for years, at will[2] and by sufferance.[3] The two latter seldom arise except by implication, and since, in either case, the responsibilities and privileges of the tenant are very limited, do not, as we have observed, call for any notice here. The chief distinctions between leases for life and leases for years arise from the fact that the former confer a freehold estate, while the latter, as will be more fully explained, convey a mere chattel interest.[4]

§ 296. **An Estate for Life** cannot, at common law, be made to commence *in futuro*. Nor can it in any case be created by parol. And being for an uncertain period, the tenant is entitled to emblements, that is, such annual products of the land as are the result of his own care and labor, although they do not mature during the existence of his estate. Another incident of a life estate is the right to

[1] Smith, Landl. & Ten. 60.

[2] Tenancy by will not assignable. McLeren v. Benton, 73 Cal. 329.

[3] Tenant at sufferance has merely naked possession. McLeren v. Benton, 73 Cal. 329.

[4] *Infra*, § 297.

take reasonable estovers, which is the right or privilege a tenant has of furnishing himself with such wood from the demised premises as may be sufficient or necessary for his fuel, fences and agricultural operations.

An estate for life may be either for the life of the tenant, or for the life or lives of one or more other persons; and may be created either by act of law or by act of the parties. The former are called legal, and the latter conventional life estates. Among the legal life estates are dower and curtesy. A conventional life estate may be created either by express limitation, or by a grant in general terms. At common law a grant to a man, or to him and his assigns, without any limitation in point of time, will be considered as an estate for life, and will continue for the life of the grantee only. But this rule has been changed by statute in many of the States.[1] A tenant for life may make under leases which will pass all the rights and privileges incident to the original estate, subject to be defeated by the death of the person upon whose life the first estate depends. It may be further remarked that a tenant for life is bound to pay all taxes,[2] and to keep down the interest on incumbrances, and other annual charges upon the land, out of the profits of the estate, though he is not chargeable with the incumbrance itself.[3]

§ 297. **A Lease for Years** is one which is to terminate in a fixed and definite period of time. It is called a *term*, because its duration is limited and determined; and this word is used to express not only the duration of the interest of the lessee, but also the estate which he has. A term may be for one or more years, and even though the number of years should exceed the ordinary limit of human life, the lessee will be treated as a tenant for years,[4] "notwithstanding it should be for a thousand years."[5] The prefer-

[1] *Ante*, § 85.
[2] Patrick v. Sherwood, 4 Blatchf. 112.
[3] Prettyman v. Walston, 34 Ill. 175; Mosely v. Marshall, 27 Barb. 42.
[4] Co. Litt. 46, *a*.
[5] Co. Litt. 46, *a*.

ence given by the common law to the tenant of a freehold above a tenant for years depends upon feudal principles, which have no application to the condition of society under a republican form of government. Consequently, in many of the States the common-law doctrine, in respect to estates less than freehold, has been more or less modified by statute, by making the interest of a lessee of a term of a certain number of years (in some a greater, in others a less number), an estate in land, and as such subject to lien of a judgment, liable to taxation, and to be sold under execution the same as real estate.[1] But, with the exceptions created by statute, estates for years still have the properties of chattel interests, however long the term, such as merging in the freehold, descending to personal representatives instead of heirs, not being subject to dower, passing by will, being liable to be sold as personal property, and the like.[2] We cannot undertake to review here the legislation of the several States upon the subject, but would suggest to readers who may have occasion to examine titles to leasehold estates, the importance of familiarizing themselves with the laws of their respective States in this particular.[3]

A term of years may be created to take effect at a future date,[4] provided the period does not reach that which constitutes in law a *perpetuity;* that is such a limitation as would render the property inalienable beyond the period allowed by law. The tenant of a term of years, the duration of which depends upon no contingency, is not entitled to emblements, as such;[5] but by local custom he may be allowed to reap a crop which he has sown, after his lease has expired. The parties to a lease may, of course, regulate

[1] Com. Dig. Landl. & Ten., 5.

[2] *Ex parte* Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. 350; 4 Kent's Com. 94.

[3] See Stimson's Amer. Stat., §§ 2000-2100.

[4] Becar v. Flues, 64 N. Y. 518; Williams v. Downing, 18 Pa. St. 60.

[5] Whitmarsh v. Cutting, 10 Johns. 360; Harris v. Carson, 7 Leigh (Va.), 632.

such matters by express stipulation, but in the absence of such, every demise is open to explanation by reference to the general usage of the country, of which every person is supposed to be cognizant when making contracts.[1] A tenant for years has the same right to reasonable estovers as a tenant for life, unless restrained by some provision contained in his lease.[2] A term of years may, in general, be created by any one having an estate greater than the term itself. Not only can a tenant in fee, or for life, create a term of years, but one who is himself a tenant for years may grant a smaller estate out of his own. But the tenant of a term, however long, cannot create a life estate, inasmuch as it would be a greater estate than his own. Terms of years may also be created within certain limits by persons under disabilities to grant a freehold, which will be further explained hereafter.[3]

ARTICLE II.

WHETHER A LEASE OR AN AGREEMENT FOR A LEASE.

SECTION.

303. Agreements for leases are of two sorts.
304. Whether a lease or an agreement for a lease.
305. The effect of a want of certainty.

§ 303. **Agreements for Leases may be Classed under two General Divisions, namely:** Contracts expressly entered into as agreements for leases, and those which operate as agreements by construction of law, though not expressly

[1] Stultz v. Dickey, 5 Binn. (Pa.) 285; Van Ness v. Pacard, 2 Pet. 138; Biggs v. Brown, 2 Serg. & R. 14; Van Doren v. Everitt, 5 N. J. L. 460; Templeman v. Biddle, 1 Harr. (Del.) 522; Clark v. Harvey, 54 Pa. St. 142.

[2] Shep. Touch. 3, note 1.

[3] *Infra*, Art. III.

entered into as such. In respect to the former we shall have but little to say, since preliminary agreements for leases are seldom useful or desirable in ordinary transactions between landlord and tenant, and being executory contracts simply, do not call for much notice in a work like the present. It may be remarked, however, that when such contracts are entered into, the safest plan is to insert all stipulations of agreement literally as they are intended to stand in the lease. Though an agreement which is silent upon the question of covenants, or which provides that the lease shall contain the "usual" or "proper" covenants, will receive a reasonable construction, and will generally be held to imply an agreement by both parties to enter into certain covenants applicable to all leases, yet no covenant can, as a general proposition, be inserted in a lease made in pursuance of such an agreement, except such as are implied by law as being strictly incidental to the subject-matter of the contract.[1]

§ 304. **Whether a Lease or an Agreement.**—Whether an instrument will be construed to be a lease or an agreement for one, depends upon the paramount intention of the parties, as collected from the whole tenor and effect of the instrument.[2] If, from the whole instrument taken and compared together, it clearly appears to have been intended as a mere executory agreement for a future lease, the intention will prevail;[3] or, if on the other hand, the intention of the parties seems to have been that of a present demise, and there appears nothing further to be done, possession being taken under it, such intention must prevail.[4]

[1] Denas' Pr. Conv. 363, 365.

[2] Burnett v. Scribner, 16 Barb. 621; Price v. Williams, 1 Mees. & W. 6; Johnson v. Phœnix Mutual Life Ins Co., 46 Conn. 92; Baker v. Bowdoin, 22 Pick. 401; Poole v. Bentley, 12 East, 168. And see *ante*, § 10.

[3] *Ibid.*; Hallett v. Wylie, 3 Johns. 47; Thornton v. Payne, 5 Johns. 74; Jackson v. Delacroix, 2 Wend. 433; Shaw v. Farnsworth, 108 Mass. 358; Potter v. Mercer, 53 Cal. 668; Brookhaven v. Baggett, 61 Miss. 383.

[4] Jackson v. Kisselbrack, 10 Johns. 336; Jenkins v. Eldredge, 3 Story, 325; Kabley v. Worcester Gas Co., 102 Mass. 394; Alderman v. Neate, 4 Mees. & W. 719; Bacon v. Bowdoin, 22 Pick. 401; Griffin v. Knisely, 75

While a mere agreement to give a lease at a future date does not create the relation of landlord and tenant, yet when the owner permits another to go into possession under an agreement for a lease a tenancy is created which entitles the person in possession to notice to quit before the owner can sue for possession.[1] If a fuller lease is to be prepared and executed before the demise is to take effect, and possession given, it is an agreement for a lease, and not a lease which creates an estate.[2] But where an instrument of this character contains a clause to the effect that it shall be considered binding until a lease can be executed, it will generally be construed to be a present lease, and there may also be circumstances from which such an intention will be inferred.[3] Where the instrument is ambiguous, it has been held that subsequent acts and declarations of the parties may be looked to in aid of the construction sought.[4]

§ 305. **Want of Certainty** as to the time when a term is to commence or end, and the amount of rent to be paid, will, generally, induce courts to construe the instrument as an agreement, in preference to a lease;[5] though, if the in-

Ill. 411; Haven v. Wakefield, 39 Ill. 509; McGrath v. Boston, 103 Mass. 369; Shaw & Farnsworth, 108 Mass. 358.

[1] Neppoch v. Jordan (Oreg.), 14 Pac. Rep. 353. And if there is possession for the purpose of putting up a building and this is to continue until the rent pays for the construction, the tenancy begins on the completion of the building. Billings v. Canney, 57 Mich. 425; Rice v. Brown (Me.), 16 Atl. Rep. 334.

[2] Aiken v. Smith, 21 Vt. 172; People v. Gillis, 24 Wend. 201; Buell v. Cook, 4 Conn. 238; Wolf v. Mitchell, 24 La. Ann. 433; Doe v. Benjamin, 9 Ad. & E. 644; Averill v. Taylor, 8 N. Y. 44; 1 Washb. on Real Prop., 4th ed., 451.

[3] Taylor's Landl. & Ten. 32, 34. An agreement to give a more formal lease may amount only to a covenant for further assurance. Jackson v. Kisselbrack, 10 Johns. 336. A provision in a lease that unless three months' notice of an intention to terminate it is given it shall continue in force for another term of one year and so on indefinitely, such notice to be given three months before the termination of any one year: Held, not to be a mere covenant for renewal but that upon failure to give such notice the lease would continue in operation. Dix v. Atkins, 130 Mass. 171.

[4] Chapman v. Bluck, 5 Scott, 533.

[5] Doe v. Ries, 8 Bing. 178; Alderman v. Neate, 4 Mees. & W. 704; Dailey v. Grimes, 27 Md. 440; Haughery v. Lee, 17 La. Ann. 22.

tention of the parties sufficiently appear, it may be regarded as a lease;[1] and contemporaneous acts of the parties may sometimes be looked into in the construction of ambiguous words and phrases.[2]

ARTICLE III.

OF THE PARTIES TO A LEASE.

SECTION.

307. Who may make a lease.
308. As to a disseizee.
309. The lease of a disseizee may operate by estoppel.
310. Of leases made by infants.
311. As to the lease of a person of non-sane mind.
312. Of leases made by married women.
313. Of a lease by the tenant of a term.
314. Joint tenants and tenants in common.
315. Of a lease by a mortgagor.
316. Leases by corporations.
317. A trustee may grant a lease.
318. Of a lease by a *cestui que trust*.
319. Executors and administrators.

§ 307. **Who may make a Lease.**—All persons seized or possessed of lands or tenants may grant leases thereof for any period consistent with their own estates, except such as are under some legal disability which renders them incapable of entering into a valid contract. Having treated of these disabilities in a former chapter,[3] it will not be necessary to enter upon a general discussion of the subject here, except as peculiarly affecting leases.

§ 308. **Disseizee.**—It has been stated that at common law, as well as by statute in several of the States, every grant of land is void, if at the time of its delivery the land is in

[1] Alderman v. Neate, 4 Mees. & W. 704.
[2] Doe v. Ries, 8 Bing. 181; Chapman v. Bluck, 4 Bing. (New Cas.)195.
[3] *Ante*, Chap. I, Art. IV.

the adverse possession of another than the grantor;[1] and this applies as well to leases as to purchase-deeds. But if a lessor is in possession at the time of making the lease, he will be deemed to have the rightful possession as to all persons holding under him, even though his possession may have been obtained by the disseizin of the rightful owner;[2] while the lease of a disseizee will not take effect until he enters or recovers possession.[3] It is to be remembered, however, that this rule applies only where there is an actual adverse possession of the premises.[4] Unless there is an actual adverse holding, possession will be deemed to follow the ownership. The possession of a tenant for life is not adverse to that of the remainder-man, and hence the latter may make a valid lease.[5] So, an heir may make a lease of land which descends to him, before entry; for he is seized in law, though not in fact.[6]

§ 309. **The Operation of the Lease of a Disseizee by Way of Estoppel.**—Although a lease may not be sufficient to authorize the lessee to demand possession for the want of possession in his lessor, it will still operate by way of estoppel, and inure to his benefit if the lessor afterwards comes into possession before the expiration of the lease.[7] Therefore, if an heir apparent, or a person having a contingent remainder, or any interest in expectancy, or who has no title whatever at the time, makes a lease and afterwards an estate vests in him, the lease will operate by way of estoppel to entitle the lessee to hold the land for the time

[1] *Ante*, § 24.

[2] Bac. Abr., Leases, 1, 4; Redfield v. Utica & S. R. R., 25 Barb. 54.

[3] Co. Litt. 48, *b*.

[4] Co. Litt. 46 *b;* Plowden, 133-142.

[5] Thompson v. The Mayor, etc., 11 N. Y. 115; Smith v. Burtis, 9 Johns. 174; Grout v. Townsend, 2 Hill, 554.

[6] Shep. Touch. 269.

[7] Co. Litt. 47, 277; Bac. Abr., Leases, 1, 4; Sinclair v. Jackson, 8 Cow. 543; Cocke v. Brogan, 5 Ark. 693; Bank of Utica v. Mersereau, 3 Barb. Ch. 567; Burr v. Stenton, 43 N. Y. 462; Jackson v. Murray, 12 Johns. 201; Jackson v. Stevens, 16 Johns. 110; Jackson v. Bradford, 4 Wend. 619; Austin v. Ahearne, 61 N. Y. 6.

specified.[1] And while the lessor is estopped from contending that he had no title,[2] so also a lessee who accepts a lease, is estopped from disputing the title of his lessor.[3] Under the common law, all estoppels were required to be reciprocal and mutual, that is to say, both parties were required to be bound, or neither would be bound.[4] Therefore, if a man took a lease for years of land belonging to himself, from an infant, or *feme covert*, it would not estop him from setting up his title, because infants and *feme coverts*, by reason of their disability, are not estopped; consequently the lessee was not estopped, for want of mutuality.[5] The principle of estoppel as above stated only applied, however, where the lease was by indenture, whereby the deed became the act of both parties.[6] These rules are no longer so strictly followed, and a lessor by estoppel is bound by his demise, though the tenant may elect whether or not to take the term when it accrues; and on the other hand, a tenant is concluded from denying the landlord's title, though the counter-obligations upon the landlord to deliver and permit peaceable possession rest in contract only, and are in no sense estoppels.[7] And even when a lessor is under a disability, such as infancy, or coverture, and the lease is voidable, the lessee is estopped until it is avoided.[8]

§ 310. **The Lease of an Infant** is not absolutely void, but voidable only, and will bind an adult lessee until the minor chooses to avoid it.[9] If the lease be by deed, he can-

[1] Co. Litt. 45, *a*; Brown v. McCormick, 6 Watts, 60; Fletcher v. Wilson, 1 Smed. & M. Ch. 376.

[2] Green v. James, 6 Mees. & W. 656.

[3] Carpenter v. Thompson, 3 N. H. 204.

[4] Co. Litt. 352; Welland Canal Co. v. Hathaway, 8 Wend. 480.

[5] Co. Litt. 352, *a*.

[6] Burton Real Prop., § 850; 1 Washb. on Real Prop., 4th ed., 454; Wright v. Douglas, 10 Barb. 97.

[7] Taylor's Landl. & Ten., 7th ed., § 90.

[8] Russell v. Erwin, 38 Ala. 44; Grant v. White, 42 Mo. 285; Prevot v. Lawrence, 51 N. Y. 219.

[9] Zouch v. Parsons, 3 Burr. 1806; Scott v. Buchanan, 11 Humph. 468; Kendall v. Lawrence, 22 Pick. 540; Roberts v. Wiggin, 1 N. H. 73;

not avoid it until he comes of age;[1] but he may always enter and take the profits until the time arrives when he has legal capacity to affirm or disaffirm the deed.[2] No one but the infant himself, or his personal representatives, can avoid a lease on the ground of infancy.[3] Although a lease made to an infant is equally voidable by him, it is available to vest the estate in him.[4] With regard to his liability to pay rent, or to perform the covenants on his part, he is in the same situation as he is in respect to other contracts; he may disaffirm it when he comes of age. But so long as he remains in possession, his liability to pay rent and perform covenants subsists by virtue of the privity of estate.[5] An infant is liable for necessaries, but what are necessaries depends upon his circumstances in life. Lodgings ordinarily come within that description, and rooms used in the exercise of trade have been so considered; but the question is usually one for the jury to determine.[6]

§ 311. **The Lease of a Person Non Compos Mentis,** if he is not under guardianship, is merely voidable; but if the person be under guardianship, his lease would be void.[7] The guardian or committee of a lunatic is generally authorized by statute to execute leases of his property, under the direction of the court appointing such officer; but in the absence of statutory authority, he would have no such power.[8]

Tucker v. Moreland, 10 Pet. 71; Drake v. Ramsey, 5 Ohio, 251; Bool v. Mix, 17 Wend. 131; Roof v. Stafford, 7 Cow. 179. And see *ante*, § 309.

[1] Bac. Abr., Infancy.

[2] Roof v. Stafford, 7 Cow. 179; Stafford v. Roof, 9 *Id.* 626.

[3] Hartness v. Thompson, 5 Johns. 160; Jackson v. Todd, 6 *Id.* 257; Roberts v. Wiggin, 1 N. H. 73.

[4] Griffith v. Schwenderman, 27 Mo. 412; Baxter v. Bush, 29 Vt. 465.

[5] Kitchen v. Lee, 11 Paige, 107; Henry v. Root, 33 N. Y. 526.

[6] Hands v. Slaney, 8 T. R. 578; Lowe v. Griffiths, 1 Hodges, 30.

[7] White v. Palmer, 4 Mass. 147; Ingraham v. Baldwin, 9 N. Y. 45; Wait v. Maxwell, 5 Pick. 217; Hovey v. Hobson, 53 Me. 451; Somers v. Pumphrey, 24 Ind. 238. And see *ante*, § 26. In New York the deed of a person *non compos mentis* has lately been held entirely void. Van Deusen v. Sweet, 51 N. Y. 384.

[8] Knife v. Palmer, 2 Wils. 130.

§ 312. **The Lease of a Married Woman,** unless joined by her husband, or unless specially authorized by statute, is void.[1] But when made under a power contained in a marriage settlement or other instrument authorizing such an act, it is valid.[2] At common law, the husband has exclusive control over his wife's lands, with the right to lease and take the rents.[3] But his power of leasing her freehold estate does not extend beyond the period of their joint lives, unless he becomes entitled as a tenant by curtesy.[4] And the wife is not bound by the husband's lease of her lands, in which she has joined during his life-time. After his death she may confirm or avoid it, at pleasure.

At common law, the husband has exclusive and absolute power over the wife's chattel interests in land.[5] But if he dies without having disposed of them, they belong to her, and if she survives him, he cannot dispose of them by will.[6] The common-law doctrine in respect to the wife's property has been materially modified by statute in many of the States, so that she may now hold her separate estate, whether leasehold or otherwise, and may enjoy, dispose of and lease the same in the same manner as if she were *sole*.[7] Though, in most of the States, the husband is still required to join in the lease or conveyance of the wife's land.[8] At common law, a married woman was not competent to assume the responsibilities of a lessee. Her hus-

[1] Smith Landl. & Ten., 7th ed., § 101; Murray v. Emmons, 19 N. H. 483; 1 Washb. on Real Prop., 4th ed., 456; Eaton v. Perry, 29 Mo. 96.

[2] *Ante*, § 233; Eaton v. Whitaker, 18 Conn. 222.

[3] Marquat v. Marquat, 12 N. Y. 336.

[4] Jackson v. Holloway, 7 Johns. 81; Brown v. Lindsay, 2 Hill (S. C.), Ch. 542.

[5] Co. Litt. 361, *b*.

[6] Co. Litt. 300, *a*, *b*; Jones v. Patterson, 11 Barb. 572.

[7] Prevot v. Lawrence, 51 N. Y. 221; Hooper v. Smith, 23 Ala. 639; Knapp v. Smith, 27 N. Y. 277; Draper v. Stouvenal, 35 N. Y. 512. And in some States she may lease even to her husband. Albin v. Lord, 39 N. H. 196. And see *ante*, § 27.

[8] Child v. Sampson, 117 Mass. 62; Den v. Lawshee, 24 N. J. L. 613; Thorndell v. Morrison, 25 Pa. St. 326; Miller v. Hine, 13 Ohio, 365; Reese v. Cochran, 10 Ind. 195.

band was liable for the rent which accrued during her occupation, and it made no difference that she was at the time living separate and apart from him.[1] But in most of the States a married woman can now take a lease for years, and the term becomes her separate estate, and the rent may be enforced out of her separate property.[2]

§ 313. **A tenant for years,** unless restrained by special covenants, may grant a smaller estate out of his own.[3] And his lessee will be bound by the terms of the subletting, and not by the original lease. No privity of contract exists between an under-lessee and the original lessor; therefore no covenants entered into by the original lessee are binding upon the under-tenant, although they may be covenants running with the land, such as to pay rent, or to keep in repair.[4] This important distinction is to be observed between an under-lease and an assignment of a lease. The under-lessee is accountable only to his immediate lessor for the performance of his covenants; the land only being subject to the claims of the original lessor. While an assignment transfers all the interest of the lessee, and the assignee becomes personally liable to the lessor upon the covenants which run with the land, and the land also remains charged and liable to a distress for rent.[5] It is essential to the granting of an under-lease that some reversion be left in the lessor, though it is immaterial of what duration. If the whole term is granted, it will operate as an assignment.[6]

[1] Co. Litt. 3, *a;* Rotch v. Miles, 2 Conn. 638; Edwards v. Davis, 16 Johns. 281.

[2] Vandevoort v. Gould, 36 N. Y. 639; Taylor v. Glenny, 22 How. Pr. 240; Prevot v. Lawrence, 51 N. Y. 219; Westervelt v. Ackley, 62 N. Y. 505; Fiske v. McIntosh, 101 Mass. 66; Maxon v. Scott, 55 N. Y. 247; Gay v. Ihm, 69 Mo. 584.

[3] Nave v. Berry, 22 Ala. 382; Brown v. Powell, 25 Pa. St. 229; Eten v. Luyster, 60 N. Y. 252; Shaw v. Farnsworth, 108 Mass. 357.

[4] Halford v. Hatch, 1 Doug. 183; McFarlan v. Watson, 3 N. Y. 286; Dartmouth College v. Clough, 8 N. H. 22; Grundin v. Carter, 99 Mass. 16.

[5] Taylor's Landl. & Ten. 81.

[6] *Ibid.;* Palmer v. Edwards, 1 Doug. 187.

§ 314. **Joint tenants, and tenants in common,** may transfer their undivided interests separately, or all the parties in interest may join in a lease of the whole estate. When joint tenants join in a lease, there is but one lease, as they have but one freehold. But where tenants in common join in a lease, it amounts to several leases of their respective interests.[1] In such a case, if the lease reserves an entire rent, they may join in enforcing it, but if there is a separate reservation to each, they must bring separate actions. If the letting be a joint one, and one lessor dies, the survivor may recover the entire rent reserved.[2] It was formerly the law that one of two partners could not lease partnership property, so as to bind his copartner, without an authority under seal.[3] But this doctrine has been relaxed in most of the States, where it is held that one partner may, in the presence of the other, execute a deed for the firm. Thus, a lease made by one partner, where the remainder sign the same as attesting witnesses, was held binding upon all.[4]

§ 315. **A mortgagor,** as a general rule, has no power to grant a lease, subsequent to the mortgage, which can be set up in a court of law against the trustee or mortgagee.[5] But such leases are good as between the parties and against all persons except the mortgagee and those claiming under him.[6] If the lease is prior to the mortgage, the mortgagee has no higher rights than the mortgagor.[7]

§ 316. **In respect to corporations** it may be said that the same principles are applicable to the granting of a term of years as of the fee.[8]

[1] Powis v. Smith, 5 Barn. & Ald. 850; Mantle v. Wollington, Cro. Jac. 166; Beer v. Beer, 12 C. B. 80.

[2] Codman v. Hall, 9 Allen, 338; 1 Washb. on Real Prop., 4th ed., 461.

[3] Dillon v. Brown, 11 Gray, 180; Turbeville v. Ryan, 1 Humph. 113.

[4] Bond v. Aitkin, 6 Watts & S. 165; Bussman v. Ganster, 72 Pa. St. 291; Hart v. Withers, 1 Pa. 285; Grazebrook v. McCreedie, 9 Wend. 439.

[5] Keith v. Swan, 11 Mass. 216.

[6] Collins v. Torry, 7 Johns. 278; Willington v. Gale, 7 Mass. 138; Latimer v. Moore, 4 McLean, 110.

[7] Rogers v. Humphreys, 4 Adol. & El. 299; Moss v. Gallimore, 1 Doug. 279.

[8] Angell & Ames on Corp. 60.

§ 317. **A trustee** of land is the owner of the legal estate, and therefore may grant a lease, provided it be consistent with the quality of estate which he possesses. If there are several trustees, they must act jointly. Where the authority is joint, a lease made by part of them only would be void.[1] The person beneficially interested should also join with the trustee; otherwise, if the lessee takes with notice of the trust, he will be subject to the control of a court of equity. Though, a trustee who holds the fee may grant a valid lease for a reasonable period. What would be reasonable depends upon the peculiar circumstances of each case.

§ 318. **A lease from a cestui que trust** conveys no interest without the concurrence of the trustee,[2] and where both concur in a lease, covenants which are designed to run with the land should be entered into with the trustee, though the rent may be reserved generally during the term, without specifying to whom it is to be paid, leaving the law to give it its due appropriation.[3]

§ 319. **Executors and Administrators.**—Terms of years, being personal estate, descend, as we have before stated, to personal representatives. Executors and administrators, therefore, have absolute power to assign or lease them, the rent being assets in their hands.[4] And executors who hold the legal estate in the realty may make such leases as come within the course of a due administration of the estate. But administrators, as a general rule, can only act under the authority of the court which appointed them.[5]

[1] 1 Story's Eq. Jur., § 1062.

[2] Blake v. Foster, 8 Term Rep. 487, 492.

[3] Webb v. Russell, 3 Term Rep. 393.

[4] Bac. Abr., Leases, 1, 7.

[5] Bank of Hamilton v. Dudley, 2 Pet. 492; Porter v. Williams, 9 N. Y. 142.

CHAPTER VI.—The Formal Parts of a Lease.

Article I. Date of Commencement and Termination.
II. Words of Demise—Premises Let.
III. Of the Reservation of Rent.
IV. Conditions of Forfeiture and Re-Entry.
V. The Usual Covenants in Leases.

ARTICLE I.

DATE OF COMMENCEMENT AND TERMINATION.

SECTION.
321. Preliminary remarks.
322. A certain beginning and certain ending essential to a term.
323. A term originally uncertain may be rendered certain, how.
324. The time of commencement, how fixed.

§ 321. **Preliminary Remarks.**—We may be permitted to repeat that a demise for a longer period than that for which parol leases are binding, must be by deed. So must any lease which is intended to embrace the various covenants usually entered into by the parties. An estate for life being in the nature of an incorporeal hereditament, must also be created by deed. Since leases by deed are, generally, required to be entered into with the same solemnity as deeds transferring the fee, and as the same general principles apply in respect to the names of the parties, re-

citals and the like, it will only be necessary to refer the reader to those heads under a former chapter.[1]

§ 322. **A Certain Beginning and a Certain Ending Essential to a Term.**—A certain beginning and a certain time at which the lease is to terminate is essential to a good lease for years. A definite and limited period of duration is of the essence of the term.[2] But although there may appear no certainty of years in the lease, yet if by reference to a certainty it may be ascertained and made certain, it is sufficient.[3] The maxim is "that is certain which may be rendered certain." The illustrations given by Coke are as follows: "If a man shall make a lease to J. S. for so many year as J. N. shall name, it is a good one; for when J. N. has named the number of years, the duration of the term becomes fixed. And if the lease be to J. S. for twenty-one years, if he lives so long, it is good. But a lease given to a person for so many years as he shall be parson of Dale, or so many years as he shall live, would not only be for an uncertain time, but never could be made certain so as to be valid as a term."[4] Though if properly executed, it might be good as a freehold estate.

§ 323. **A Term Originally Uncertain may be Rendered Certain by Matters Ex Post Facto.**—Thus, if it be granted for so many years as A. B. shall name, the lease though uncertain at the beginning will be valid *ab initio*, after the naming of the years.[5] So a lease at a specific rent "until the lessee shall, out of the rents, repay himself" for a certain amount of expenses incurred by him in repairs, was held sufficiently definite to create a valid term.[6] A lease for the whole time that the lessee may be postmaster ex-

[1] *Ante*, Chap. II, Arts. III., IV. For form of lease, see Stimson's Amer. Stat., § 1487.

[2] By statute in some of the States long leases of agricultural lands are prohibited. Stimson's Amer. Stat., § 405.

[3] Shep. Touch. 272.

[4] Co. Litt. 45, *b*; Prest. Conv. 159. And see West. Transp. Co. v. Lansing, 49 N. Y. 508.

[5] Goodright v. Richardson, 3 Term R. 463.

[6] Batchelder v. Dean, 16 N. H. 268.

pires with the expiration of the commission held by him at the time of the execution of the lease.[1] A lease "for years," without stating how many, would be good for two years.[2] But a lease, "to hold from the first day of April, from year to year, so long as the parties agree," was held not necessarily to constitute a lease for more than one year.[3] A lease may also be of perpetual duration. Thus, a demise "as long as water runs or grass grows," was held good as a perpetual lease.[4] But devises of this description are usually in the form of a grant of land in fee, reserving the payment of an annual rent instead of a present consideration.[5]

§ 324. **The Time of Commencement.**—The date will fix the time for the commencement of the lease, unless some other period is specified in the instrument itself for that purpose; but if there is no date, or an impossible one, the time will be considered as having commenced from the delivery of the deed.[6] If the date is such as to render the limitation uncertain, as if it be made January 1st "to hold from the first day of August," without saying of what year, the lease would be void for uncertainty.[7]

If a lease for years be limited to commence after the expiration of a lease which is recited to have been made to a third person, when in fact there never was such a lease, or if it had already expired, or is void, the new lease will take effect immediately on its execution; except that the interest of the tenant will only begin upon entry. In a lease for

[1] Easton v. Michell, 21 Ill. App. 189.

[2] Bac. Abr., Leases, 3.

[3] Fox v. Nathans, 32 Conn. 351.

[4] White v. Fuller, 38 Vt. 193.

[5] Co. Litt. 43, *b*.

[6] Taylor's Landl. & Ten., § 113; Doe v. Day, 10 East, 427. The jury have a right to take into account and consider the time when the defendant went into possession, the time from which he paid the rent, and all other circumstances thereon which throw any light upon the question of when the lease was to commence. Pendill v. Neuberger (Mich.), 35 N. W. Rep. 249.

[7] Bac. Abr., Leases (L.), 1.

years an actual entry is necessary to vest the possession in the lessee; the bare lease gives him only a right to enter, which is called an *interesse termini*.[1] An estate for life needs no expression of the time at which it is to commence, because it cannot be made to commence *in futuro*, neither can its duration be ascertained.[2]

ARTICLE II.

WORDS OF DEMISE—PREMISES LET.

SECTION.

326. The words of demise.

327. The description of the premises.

§ 326. **The Words of Demise** usually employed in the creation of a term of years are "grant," "demise" and "to farm let." But no particular form of words is necessary to a lease. Any expression which shows an intention on the part of the lessor to divest himself of the possession in favor of the lessee, and a corresponding intention on the part of the lessee to come into possession of the premises for a determinate period of time, is sufficient.[3] Some words, however, have a technical and more extensive signification than others. For instance, the words "do demise and let," were held to import the creation of a term to begin presently, and not at a future day on a contingency.[4] We have seen in a former chapter, that the words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment, the effect of which will be further noticed under the head of Covenants in Leases.[5]

[1] 1 Washb. on Real Prop., 4th ed., 439.

[2] Taylor's Landl. & Ten., § 70.

[3] Hallett v. Wylie, 3 Johns. 47.

[4] Meeting House v. Hilton, 11 Gray, 409.

[5] *Ante*, § 173; *infra*, § 344; Stott v. Rutherford, 92 U. S. 107; Berring-

§ 327. **The Description of the Premises** constituting the subject of the demise must be sufficiently accurate to ascertain the property intended, with reasonable certainty, or the lease will be void.[1] The rules of construction to be applied in identifying boundaries in a lease, are the same as those applicable to grants in fee,[2] which have heretofore been considered.[3] But in practice, it is quite common to use less accuracy in the description of the premises in a lease than is usual in case of deeds conveying a freehold.[4]

As a rule, in drawing a lease, it is not advisable to particularize too minutely all the various circumstances of name, place, boundary, occupation, etc., except such as are sufficient for the purpose of identity, as numerous circumstances or conditions lead to confusion, and questions frequently arise as to how far particular explanations may qualify words of general description. All things usually comprehended under the words "house," "farm," "land," "store," etc., together with the appurtenances necessary for the proper use and enjoyment of the thing let, pass to the tenant under such general words of description, unless there be an express exception.[5] But whether certain premises are parcel of or appurtenant to the demise or not, depends upon the intention of the parties, and is always matter of evidence.[6] It may be added that any inaccuracies

ton v. Casey, 78 Ill. 317. And see Grannis v. Clark, 8 Cow. 36; Sumner v. Williams, 8 Mass. 201.

[1] Dingman v. Kelly, 7 Ind. 717; Pierce v. Minturn, 1 Cal. 470; McLaughlin v. Bishop, 35 N. J. L. 512.

[2] The rule, that where boundaries are given with reference to fixed and known objects, they control courses and distances,—declared to be universal, and applied to a lease. Kamphouse v. Gaffner, 73 Ill. 453.

[3] *Ante*, Ch. II., Art. VII.

[4] Though the description of the premises in a lease is imperfect, yet if they were taken possession of and occupied under the lease, it is sufficient. Pierce v. Minton, 1 Cal. 470.

[5] By the lease of a building, everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as incident, unless especially reserved. Biddle v. Littlefield, 53 N. H. 503; Bell v. Golding, 27 Ind. 173; Doyle v. Lord, 64 N. Y. 432; Canfield v. Ford, 28 Barb. 336; Sherman v. Williams, 113 Mass. 481.

[6] Trimble v. Ward, 14 B. Mon. 8. A lease of a "building" conveys the

as to name, amount, quantity or measurements will be corrected, if there be enough in the lease to make the purpose and intention of the parties certain.

ARTICLE III.

OF THE RESERVATION OF RENT.

SECTION.

329. There must be a consideration—may be what.
330. Of the words used in reserving rent.
331. To whom reserved.

§ 329. **Necessity of Consideration.**—Some consideration must appear, although it need not be what is technically called rent, or a periodical render of compensation for the use of the premises. It may be a sum in gross, or the natural affection which one party has for the other; or the reservation may be, not only money, but grain, animals, produce, or the personal service of the lessee.[1] And it is not absolutely necessary that the amount of the reservation be fixed at the creation of the tenancy, as this may be determined afterwards.[2] If no amount is agreed upon, the tenant will be bound to pay what the premises are reasonably worth.[3] If the consideration is fraudulent, unlawful, or immoral, the lease will be void.[4]

§ 330. **Words Used in Reserving Rent.**—The words generally used in reserving rent are "yielding and paying," but any form of words which expresses the meaning and intention of the parties will be equally effectual. And it

land under the eaves and projections, if that land is owned by the lessor. Sherman v. Williams, 113 Mass. 481.

[1] Taylor's Landl. & Ten., § 152.

[2] 4 Kent's Com. 462.

[3] Scrantom v. Booth, 29 Barb. 171; Newell v. Sanford, 13 Iowa, 191.

[4] Browne v. O'Dea, 1 Sch. & L. 115.

is sufficient that the reservation be made in general terms, without saying to whom. In that case the intent will be directed according to the nature of the grantor's interest,[1] and if the lessor should die, the rent would go to his heirs.[2]

§ 331. **To Whom Reserved.**—If a special reservation is made, care must be taken that it is made to him from whom the estate in the land is derived.[3] Rent, as such, cannot be reserved to a stranger, for want of privity of estate.[4] As a general rule, rent reserved to be paid during the term goes to the person entitled to the reservation: but it is proper, when the demise is of a chattel interest, to reserve the rent to the lessor and personal representatives of a life estate, to him and his heirs. Upon the death of a landlord, if the rents and profits be not devised, they attend the estate in its descent to the heir;[5] and if there are several heirs, the rent becomes several, and each heir may maintain an action upon the covenant to recover the portion of the rent due him.[6]

[1] Jaques v. Gould, 4 Cush. 384.

[2] Co. Litt. 47; Plowd. 171; Sacheverell v. Froggatt, 2 Saund. 367.

[3] Co. Litt. 47, *a*; Hornbeck v. Westbrook, 9 Johns. 73; Ege v. Ege, 5 Watts, 138; Gilbertson v. Richards, 4 Hurl. & Nor. 276.

[4] In Brewer v. Dyer, 7 Cush. 337, the reservation of rent to a stranger was held binding upon the principle that, "when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." But in Exchange Bank v. Rice, 107 Mass. 41, the court overrules that doctrine. And see Mellen v. Whipple, 1 Gray, 317.

[5] 4 Kent's Com. 287. Rent accruing after lessor's death, is a chattel real, and descends to the heir, and does not go to the executor. Green v. Massie, 13 Ill. 363.

[6] Cruger v. McLaury, 41 N. Y. 219.

ARTICLE IV.

CONDITIONS OF FORFEITURE AND RE-ENTRY.

SECTION.

333. Purposes and form of such condition.
334. What covenants may be enforced by condition.
335. Conditions not favored in law.
336. The demand necessary to make a condition available.
337. What will constitute a breach of the condition.
338. Proviso for re-entry in case of forfeiture.
339. Who may take advantage of a condition.
340. Condition once waived cannot be enforced again.
341. Until re-entry the estate remains in the lessee.

§ 333. **Purposes, and Form of the Condition.**—By conditions of forfeiture and re-entry is meant a clause of contingency upon the happening of which the estate granted may be defeated.[1] Such a clause is generally used as a means of securing the performance of stipulations contained in the lease, by providing that in case of breach, the lease shall forfeit and become void, or that the lessor may enter and defeat the estate of the lessee.[2] The usual and proper words to make a condition are "upon condition," or "provided that," but no particular form of words is necessary. Any words which show the intent will be sufficient. The same words may import both a covenant and a condition.[3]

§ 334. **What Covenants may be Enforced by Condition.**—The performance of any covenant running with the estate may be provided for by condition, whereby the lessor, his heirs or assigns may enter, for a breach, and repossess the premises as if no lease had been made. Among the covenants to which such conditions are commonly attached, are the covenants to pay rent, to pay taxes, to repair, to permit the lessor to enter and inspect the state of

[1] 2 Bl. Com. 299.

[2] In the absence of a provision therefor in the lease non-payment of rent does not work a forfeiture. Buckner v. Warren, 41 Ark. 532.

[3] Co. Litt. 203, *b*; Jackson v. McClallan, 8 Cow. 295. And see Crawley v. Mullins, 48 Mo. 517.

repair, and to repair upon notice of want of repair, to insure, not to use the premises otherwise than as a private dwelling (or other purpose for which the same is intended to be used) without license, and not to assign or underlet without the written consent of the lessor. To be valid, a condition must not be against the policy of the law, such as an unwarrantable restraint of trade, or marriage, or the power to alienate, or immoral in its tendencies, as if it be to encourage crime, or the omission of a duty.

§ 335. **Conditions which Work a Forfeiture are not Favored in Law,** and are strictly construed. But such conditions as are annexed to estates for years are, as a rule, more favored than those which tend to defeat freehold estates. Thus, a grant to one in fee with a condition not to alien would be void, though such a condition annexed to an estate for years may be good.[1] But courts always construe conditions so as to save a forfeiture, if it can fairly be done.[2]

§ 336. **Of the Demand Necessary to make a Condition Available.**—At common law, a party wishing to avail himself of the right to enter for the breach of a condition to pay rent must make demand of the precise sum due, in the evening of the day the same becomes due, long enough before sundown to have light by which to count the money.[3] And such demand, moreover, must be made upon the land and at the most notorious place upon it, which would be the front door of the dwelling-house, if there was one on the land, unless some other place was agreed upon.[4] Nor will the fact that no one is present obviate the necessity of an actual demand, or authorize it to be made at a different time or place.[5] Although the demand must be made before sun-

[1] Burton on Real Prop., § 852.

[2] Spear v. Fuller, 8 N. H. 171; Chapman v. Kirby, 49 Ill. 211; McQuesten v. Morgan, 34 N. H. 406.

[3] Co. Litt. 202, *a*, note; Chadwick v. Parker, 44 Ill. 326; Jones v. Reed, 15 N. H. 68; Willard v. Benton, 57 Vt. 286.

[4] Duppa v. Mayo, 1 Saund. 287; McGlynn v. Moore, 25 Cal. 384.

[5] Co. Litt. 202, *a*; Chapman v. Harvey, 100 Mass. 354; Chadwick v.

down, the rent is not due until midnight, and a forfeiture may be saved by the lessee's tendering the rent due at any time before that hour, allowing sufficient time to count the money.[1]

The precision required in the fulfillment of the prerequisites above mentioned, to enable a landlord to take advantage of a forfeiture for non-payment of rent, renders it difficult and perplexing to succeed in this respect. It is to avoid this that stipulations waiving demand are inserted in leases.[2] Where a lease provides that the lessor may enter for a breach without previous demand being made, no demand is necessary.[3] The importance of inserting such a clause in drawing a lease of this character will be apparent to every one. Whether the demand is necessary when the covenant is to pay taxes, does not appear to be well settled.[4]

§ 337. **What will Constitute a Breach.**—In considering what will constitute a breach of a condition sufficient to work a forfeiture, the strictness with which courts construe and apply conditions and forfeitures will be further illustrated. Thus, where the clause giving the right of re-entry was "if the lessee shall do or cause to be done any act, matter or thing, contrary to, and in breach of any of the covenants," one of the covenants contained in the lease being to repair, the court held that the condition only related to acts done, and not the omission to make repairs.[5] And where a lease, among other things, contained a covenant not to assign or underlet, and a condition was inserted

Parker, 44 Ill. 326; Chapman v. Kirby, 49 Ill. 211; Jackson v. Kipp, 3 Wend. 230; Remsen v. Conklin, 18 Johns. 447; McQuesten v. Morgan, 34 N. H. 400.

[1] Co. Litt. 202, *a*; Academy of Music v. Hackett, 2 Hilton, 217.

[2] Byrane v. Rogers, 8 Minn. 282.

[3] 2 Platt on Leases, 338; Fifty Associates v. Howland, 5 Cush. 214; Sweeney v. Garrett, 2 Disney (Ohio), 601.

[4] Meni v. Rathbone, 21 Ind. 454, holding such a demand to be necessary. *Contra*, Byrane v. Rogers, 8 Minn. 285. And see Jackson v. Harrison, 17 Johns. 66; Garner v. Hannah, 6 Duer (N. Y.), 262.

[5] Doe v. Stevens, 3 Barn. & Ad. 299.

that the lessor might enter if the lessee failed to pay rent, or committed waste, an assignment by the lessee was held to be a breach of his covenant merely, and not a breach of the condition.[1] So a condition to underlet is not broken by an assignment.[2] Nor a condition not to assign, by underletting the premises.[3] A condition not to alien is not broken so as to work a forfeiture, if it be done against the will of the lessee, as by decree of court, unless there is an express condition to that effect.[4] And upon the death of a lessee his executor may assign the term, unless expressly restricted from so doing.[5]

§ 338. **Provisos for Re-Entry.**—In the absence of a proviso for re-entry in case of forfeiture, the lessor would have no such power, and this applies alike to all covenants in a lease. The mere breach of a covenant enables the lessor to sue for damages only. So, a proviso in a lease to re-enter for condition broken, can only operate during the term, and vanishes when that ends.[6]

§ 339. **Who may Take Advantage of a Forfeiture.**—Conditions are intended solely for the benefit of the lessor, and can only be taken advantage of by him or his assigns.[7] Even though a lease, by its terms, is to be void if the condition is broken, this is construed to be at the option of the lessor, and may be enforced by him or not at his election.[8] It is a personal right, and cannot be assigned after the condition is broken, so as to give the purchaser a right to enter for a breach arising before he became the owner.[9] But the assignee of the reversion has the same advantage against

[1] Barnes v. McCubbin, 3 Kan. 226; Spear v. Fuller 8 N. H. 174.

[2] Lynde v. Hough, 27 Barb. 415; Field v. Mills, 33 N. J. L. 254.

[3] Hargrave v. King, 5 Ired. Eq. 430; Parmenter v. Webber, 8 Taunt. 593.

[4] Jackson v. Corliss, 7 Johns. 531; 1 Smith's Lead. Cas. 1st Am. Ed. 66.

[5] 2 Platt on Leases, 265; Taylor's Landl. & Ten., § 408.

[6] Johns v. Whitley, 3 Wilson, 140.

[7] Way v. Reed, 6 Allen, 364; King's Chapel v. Pelham, 9 Mass. 501; Jackson v. Topping, 1 Wend. 388.

[8] 2 Platt on Leases, 329.

[9] Trask v. Wheeler, 7 Allen, 110.

the lessee, for a breach of condition made after he becomes owner, as the original lessor had.[1] At common law, an assignee of a reversion could not enter for a condition broken, the law not favoring the assignment of a chose in action;[2] but the statute, 32 Henry VIII., ch. 34, remedied this, by providing that assignees or grantees of a reversion should be entitled to "like advantages against the lessees, their executors, administrators and assigns," as the lessors and grantors might have had.[3] The assignee of the reversion cannot take advantage of a breach of every condition; for the statute is held to refer only to conditions to do anything incident to the reversion, and not to conditions to do or not to do collateral acts.[4] An assignee of the reversion for only a part of the land is not entitled to the benefit of the statute.[5] A distinction, however, must be noted between a grantee of the reversion for only a part of the land and a grantee of a part of the reversion.[6] The latter is clearly within the statute. Although it is invariably held that a condition cannot be apportioned by the act of the grantor, some cases decide that, like a rent charge, it may be apportioned by the act of the law. Thus, it was held that one who claims as one of six children, the heirs of the owner of a rent charge, with a condition of re-entry, upon premises leased in fee, subject to such rent charge and condition of re-entry, may, upon non-payment of the rent, maintain an action of ejectment to recover one undivided sixth part of the demised premises.[7] The above statute has been very generally re-enacted in the United States.[8]

[1] Co. Litt. 215, *a*; Burt. Real Prop., § 855.

[2] Comyn Landl. & Ten., 285; Rice v. B. & W. R. Co., 12 Allen, 141; Crawford v. Chapman, 17 Ohio, 449.

[3] Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 84.

[4] Comyn Landl. & Ten 286; Co. Litt. 215, *b*.

[5] 2 Platt on Leases, 232; Co. Litt. 215, *a*.

[6] Cruger v. McLaury, 41 N. Y. 225; Wright v. Burroughs, 3 M. G. & S. 685.

[7] Cruger v. McLaury, 41 N. Y. 225; Jackson v. Topping, 1 Wend. 388; Cole v. Patterson, 25 Wend. 456.

[8] Taylor's Landl. & Ten., § 295. But not in Ohio. Crawford v. Chap-

§ 340. **A Condition having been once Waived cannot be Enforced again.**—Thus, for instance, if the condition were not to underlet without the lessor's consent, and the lessor should give express license to the lessee to do this, the right to enforce the condition as to any subsequent breach would be forever gone.[1] But a mere waiver by acquiescence, although it would ratify the assignment acquiesced in, would not extend to future assignments.[2] If a lessor acquiesce in the tenancy by accepting rent of the premises, after knowledge that a breach of condition has been committed, he will be presumed to have waived the forfeiture;[3] but to have that effect, it must be rent which became due after the breach.[4] Such a waiver, as we have stated, would not extend to a subsequent breach.

§ 341. **Until Re-Entry the Estate Remains in the Lessee.**—Until re-entry is made by the lessor, for breach of a condition, the estate remains in the lessee and his assigns, the same as before the breach, since a condition does not operate like a conditional limitation to determine the estate. The general nature of conditions, as distinguished from limitations and covenants, has been treated of in a former part of this work to which the reader is referred.[5]

man, 17 Ohio, 449. And see Van Rensselaer v. Hays, 19 N. Y. 68; Tyler v. Heidorn, 46 Barb. 439.

[1] Dumpor's Case, 4 Coke, 119, *b;* Cartwright v. Gardiner, 5 Cush. 281; Bleecker v. Smith, 13 Wend. 530; Dakin v. Williams, 17 Wend. 447; McKildoe v. Darracott, 13 Gratt. 278; Gannett v. Albree, 103 Mass. 372; Murray v. Harway, 56 N. Y. 343; Lynde v. Hough, 27 Barb. 415; Pennock v. Lyons, 118 Mass. 92. In England, by Statutes 22 and 23 Vict., ch. 35, §§ 1, 2 and 3, the above law is changed, by which a license to do anything which would be otherwise a breach of a condition or covenant in a lease, will extend only to the specific act licensed to be done. 1 Washb. on Real Prop., 4th ed., 472. And see 7 Amer. Law Review, 633.

[2] Burt. on Real Prop., § 853; Doe v. Bliss, 4 Taunt. 735.

[3] Ireland v. Nichols, 46 N. Y. 413; McGlynn v. Moore, 25 Cal. 384; Coon v. Brickett, 2 N. H. 163.

[4] Co. Litt. 211, *b;* Bleecker v. Smith, 13 Wend. 530; Hunter v. Osterhoudt, 11 Barb. 33; Jackson v. Allen, 3 Cow. 220; Gomber v. Hackett, 6 Wis. 323.

[5] *Ante*, Ch. II., Art. X.

ARTICLE V.

THE USUAL COVENANTS IN LEASES.

SECTION.

343. Express and implied covenants.
344. Of the covenants implied on the part of the lessor.
345. The covenants implied on the part of the lessee.
346. Who will be bound by implied, and who by express covenants.
347. Real and personal covenants.
348. What covenants run with the land, and what do not.
349. The effect of a covenant running with the land.
350. When assigns must be named, to be affected by a covenant.
351. The express covenants usually entered into by the lessor.
352. The covenant for quiet enjoyment.
353. The covenant to repair.
354. The covenant to renew the lease.
355. Covenants against incumbrances—for further assurance.
356. The usual express covenants on part of the lessee.
357. Of the covenant to pay rent.
358. To pay taxes and other assessments charged upon the premises.
359. The covenant to insure the premises.
360. Not to use the premises for purposes of trade.
361. Not to assign or underlet.
362. To deliver up the premises in good repair.

§ 343. **Express and Implied Covenants.**—Covenants are usually inserted in leases for the purpose of limiting or otherwise defining the rights and duties of the parties; but if no express agreement in this respect is contained in the lease, the rights and obligations of the parties are regulated by law. As thus distinguished, covenants are either express or implied, or, as sometimes termed, covenants in law or in deed. We have heretofore alluded to the covenants implied by the words "grant," "demise" and "lease," and it will not be necessary to repeat what has been said on that subject.[1]

§ 344. **Covenants Implied on the Part of the Lessor.**—

[1] *Ante*, § 173. There is no implied covenant for quiet enjoyment raised by the use of the word "demise" in a lease, when later it is expressly stipulated that nothing therein contained should be construed to imply such a covenant. Maeder v. Carondelet, 26 Mo. 112.

Aside from the covenants implied by the words mentioned, or from any particular form of words, the law supposes that when a man makes a lease, he has a good title to the land, and consequently a right to lease it: and his undertaking to do so implies a covenant to this effect. It is also to be understood as a condition of his right to demand rent, that the lessee is not to be disturbed in his possession of the premises during the term, by the lessor or by any other person having a paramount title.[1] And this covenant is implied on the part of a lessor in every case of a tenancy for a fixed period, however short it may be.[2] But there is no such implied covenant against the acts of strangers.[3] And the covenant for quiet enjoyment extends only to possession, while the covenants implied by the words "demise," etc., extend to title. The former is broken only by actual disturbances of possession by the lessor or some one holding a paramount title.[4] The latter may be broken wherever a covenant for seizin, right to convey, or against incumbrances would be broken.[5]

When a lease for years contains an express covenant for quiet enjoyment, no other or further covenant in respect to enjoyment will be implied, although in such cases a covenant for quiet enjoyment is, ordinarily, implied.[6] For example, if a lessor covenants against the acts of a particular person only, his general implied obligation is restricted by his special covenant, and a molestation by that person only will constitute a breach of the covenant.[7]

[1] Burwell v. Jackson, 9 N. Y. 535; Mack v. Patchin, 42 N. Y. 167; Baugher v. Wilkins, 16 Md. 35; Gazzolo v. Chambers, 73 Ill. 75; Berrington v. Casey, 78 Ill. 317; Wade v. Halligan, 16 Ill. 507; Schuykill, etc. R. R. v. Schmoele, 57 Pa. St. 273. The doctrine is true also of a lease of an incorporeal hereditament. Mayor v. Mabie, 13 N. Y. 150.

[2] Hart v. Windsor, 12 Mees. & W. 85; Whitney v. Allaire, 4 Den. 554.

[3] Moore v. Weber, 71 Pa. St. 429; Branger v. Manciet, 30 Cal. 626.

[4] Gardner v. Keteltas, 3 Hill, 330; Coddington v. Dunham, 45 How. Pr. 40.

[5] Miller v. Thornton, 1 Duv. 369.

[6] Gano v. Vanderveer, 34 N. J. L. 293.

[7] Howell v. Richards, 11 East, 642; Burr v. Stenton, 43 N. Y. 462.

In the absence of an express covenant to that effect, a lessor is not bound to make repairs upon the leased premises.[1] Neither is there any implied contract on the part of the landlord that the premises are tenantable or fit for any particular use.[2] Yet it has been held that, when a landlord knows that a cause exists which renders the house unfit for occupation, it is a wrongful act on his part to rent it without notice to the lessee of its condition; and if, after discovering and experiencing its injurious effects, the tenant is compelled to quit the house, the landlord cannot enforce the contract for payment of rent.[3]

§ 345. **Covenants Implied on the Part of the Lessee.** —A covenant to pay a fair rent is implied on the part of every tenant, so long as he occupies the premises without obstruction on the part of the landlord.[4] And, independent of any express agreement, the law also raises an implied obligation on his part to treat the premises in such a manner that no

[1] Clark v. Babcock, 23 Mich. 164; Estep v. Estep, 23 Ind. 114; Witty v. Mathews, 52 N. Y. 512; Leavitt v. Fletcher, 10 Allen, 121; Doupe v. Genin, 45 N. Y. 119; Elliott v. Aiken, 45 N. H. 36; Krueger v. Ferrant, 29 Minn. 385. But otherwise in Georgia. White v. Montgomery, 58 Ga. 204; Lewis v. Chisholm, 68 Ga. 40; Code Ga. 1882, § 2284. Nor can the lessee in such a case make the repairs and charge the lessor with the cost of them. Biddle v. Reed, 33 Ind. 529. If a tenant puts permanent repairs on the premises without consent of the landlord, he cannot charge the landlord for them. Kline v. Jacobs, 68 Pa. St. 87; Dunn v. Bagly, 88 N. C. 91.

[2] Dutton v. Gerrish, 9 Cush. 89; Libbey v. Talford, 48 Me. 316; Kerr v. Merrill, 4 Mo. App. 591; McGlashan v. Tallmadge, 37 Barb. 313; Jaffe v. Harteau, 56 N. Y. 398; Foster v. Peyser, 9 Cush. 242; Clark v. Babcock, 23 Mich. 164; Gill v. Middleton, 105 Mass. 477; Wilkinson v. Clauson, 29 Minn. 91; Lucas v. Coulter, 104 Ind. 81.

[3] Wallace v. Lent, 29 How. Pr. 289. And see Looney v. McLean (Sup. Jud. Ct. Mass.), 11 Cent. L. J. 196; Brunswick-Balke Co. v. Rees (Wis.), 34 N. W. Rep. 732. When a landlord rents a storehouse to a tenant for the purpose of selling goods therein, in the absence of the tenant's knowledge to the contrary, the law will presume that it is in a condition suitable for the purpose for which it was rented: and if not, and damage results to the tenant's goods in consequence of the defective condition of the premises, the landlord is liable. Whittle v. Webster, 55 Ga. 180.

[4] Taylor's Landl. & Ten., 7th ed., § 371.

substantial injury shall be done to them, by any willful or negligent conduct on his part.[1] This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates.[2] Thus, it has been held that a tenant for years, or from year to year, must keep the premises wind and water tight,[3] and make fair and tenantable repairs, such as keeping fences in order, replacing doors and windows that are broken during his occupation, and the like.[4] But in absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if buildings are accidentally destroyed by fire or otherwise.[5] Nor is he bound to do painting, whitewashing, or anything that might be considered a mere matter of ornament.[6]

§ 346. **Who will be Bound by Implied, and who by Express Covenants.**—Notwithstanding the obligations imposed by law upon the parties to a lease, it is usual, and always advisable, to insert such express covenants in the instrument as may be agreed upon, since one who enters into an express covenant remains bound by it, though the lease be assigned over, while implied covenants are obligatory upon the tenant during his occupation of the premises only. For ex-

[1] Com. Landl. & Ten. 188; United States v. Bostwick, 94 U. S. 53.

[2] Holford v. Dunnett, 7 Mees. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs as far as possible. Horsefall v. Mather, 1 Holt. 9; Brown v. Crump, 1 Marsh. 569.

[3] Auworth v. Johnson, 5 Car. & P. 239.

[4] Cheetham v. Hampson, 4 Term. R. 318. The acceptance of a lease imposes upon the lessee an implied obligation to use the premises in a proper and husbandlike manner. Nave v. Berry, 22 Ala. 382.

[5] United States v. Bostwick, 94 U. S. 53; Bullock v. Dommitt, 6 Term. R. 650; Auworth v. Johnson, 5 Car. & P. 239; Levey v. Dyess, 51 Miss. 501; Smith v. Kerr, 108 N. Y. 31.

[6] Wise v. Metcalfe, 10 Barn. & C. 299. A lessee is liable to pay for repairs made on the premises, at his request, although in excess of the amount stipulated in the lease by him to be paid for. Benjamin v. Heeney, 51 Ill. 492.

ample, one who enters into an express covenant to pay rent remains liable, although he may have assigned his lease with the lessor's assent. And though the lessor may have accepted rent of the assignee, he may yet sue the lessee, or his assignee, or both, upon such covenant. But a lessee is not liable upon his implied covenant to pay rent, after his assignment to another, and the acceptance of rent by the lessor from the assignee.[1] The same is true in respect to assignees, both as to express and implied covenants; their liability ceases with the privity of estate between them and the lessors. An assignee, therefore, is only liable for a breach of covenant which occurs while he remains possessed of the estate.

§ 347. **Real and Personal Covenants.**—Covenants are further distinguished as real and personal; that is to say, as between such as run with the land to assignees, and are binding upon assignees by privity of estate, and those which are merely personal obligations. An attempt has been made to define this distinction in a former part of this work.[2] Very little, therefore, need be said here upon this subject. It is to be remembered, that in order to run with the land, the performance or non-performance of the covenant must affect the nature, quality or value of the demised premises, independent of collateral circumstances, or must effect the mode of enjoyment.[3] And it must not only concern the land, but there must also be a privity of estate between the contracting parties.[4]

[1] Rawle on Cov., 363, note; Walker v. Physick, 5 Pa. St. 193; Way v. Reed, 6 Allen, 369; Kimpton v. Walker, 9 Vt. 199; Patten v. Deshon, 1 Gray, 330. But if the lessor refuses to accept the assignee as his tenant, he may continue to sue the lessee in debt for the rent. Auriol v. Mills, 4 Term R. 98. A lessee would still remain liable on an express covenant, though the lessor assented in writing and actually received rent from the assignee, unless the lessor shall have accepted a surrender from the lessee and released him. Frank v. Maguire, 42 Pa. St. 82.

[2] *Ante*, § 162.

[3] Norman v. Wells, 17 Wend. 136.

[4] If a party covenant with a stranger to pay a certain rent, in consideration of a benefit to be derived under a third person, it cannot run with

§ 348. **What Covenants Run with the Land, and what do not.**—In general, all covenants which are implied, run with the land.[1] And this is the case with covenants for quiet enjoyment, whether express or implied.[2] A covenant to insure has also been held to run with the land, where the insurance was to be laid out in rebuilding;[3] likewise a covenant to pay taxes,[4] to pay rent,[5] to repair, or to deliver up in good condition,[6] to surrender at expiration of the term with such improvements as shall have been erected,[7] to cultivate the land in a particular manner,[8] to maintain a partition fence,[9] and not to carry on a particular trade on the premises.[10] But a covenant not to exercise a particular trade on another parcel of the lessor's land, does not bind a grantee of the latter parcel for want of privity of estate.[11] Where the thing to be done is merely collateral to the land, and does not touch or concern the thing demised in any way, it amounts to a personal covenant only, and is not binding upon an assignee.[12]

the land, not being made with the person having the legal estate. Allen v. Wooley, 1 Blackf. 118; Demarest v. Willard, 8 Cow. 206. And see Hurd v. Curtis, 19 Pick. 459; Masury v. Southworth, 9 Ohio St. 340; Glenn v. Canby, 24 Md. 127.

[1] Platt on Cov., 42-44; 1 Smith's Lead. Cas., 7th Am. ed., 144.

[2] Suydam v. Jones, 10 Wend. 180; Shelton v. Codman, 3 Cush. 318; Hunt v. Amidon, 4 Hill, 345; Markland v. Crump, 1 Dev. & Bat. 94; Campbell v. Lewis, 3 Barn. & Ald. 392. A covenant by the lessor to pay for improvements made by the lessee during the term runs with the land and binds the lessor's assignee. Ecke v. Felzer, 65 Wis. 55.

[3] Vernon v. Smith, 5 Barn. & Ald. 1; Doe v. Peck, 1 Barn. & Ald. 428.

[4] Martin v. Baker, 5 Blackf. 232; Post v. Kearney, 2 N. Y. 394; Astor v. Miller, 2 Paige Ch. 68.

Jacques v. Short, 20 Barb. 269; Torrey v. Wallis, 3 Cush. 442; Graves v. Porter, 11 Barb. 592. The remedy being in debt, but not in covenant. Howland v. Coffin, 12 Pick. 125; Thursby v. Plant, 1 Saund. 240.

[6] Demarest v. Willard, 8 Cow. 206; Myers v. Burns, 33 Barb. 401; Shelby v. Hearne, 6 Yerg. 512; Pollard v. Shaeffer, 1 Dall. 210.

[7] Coburn v. Goodall (Cal.), 14 Pac. Rep. 190.

[8] Cockson v. Cock, Cro. Jac. 125.

[9] Kellogg v. Robinson, 6 Vt. 276.

[10] Tatem v. Chaplin, 2 H. Bl. 133.

[11] Taylor v. Owen, 2 Blackf. 301.

[12] Co. Litt. 215, *b*; Norman v. Wells, 17 Wend. 136.

§ 349. **The Effect of a Covenant Running with the Land** is, as we have seen, to bind an assignee to its performance; and being bound to performance, he is also entitled to the benefits of such covenants as are favorable to him, except where the breach has happened before his own time.[1] Therefore, the lessor is liable to the assignee of the lease on his covenants of a like nature, among which are covenants for quiet enjoyment,[2] for further assurance,[3] to renew the lease, to repair the premises and the like.[4] But to render one liable on a covenant as assignee he must take an assignment of the whole, or a part of the premises for the whole term; for although an assignee of the lessee would be bound, a sublessee would not; nor would the assignee of such sublessee.[5] As between the lessor and an under-tenant of the lessee there is neither privity of estate nor of contract, so that as between these parties there can be no advantage taken of the covenants dependent upon a lease, either express or implied.[6] It may be added that the relation of landlord and tenant does not exist as between the tenant of a mortgagor and the assignee of the mortgagee, although there is a kind of tenancy between mortgagor and mortgagee.[7]

§ 350. **When Assignees must be Named to be Affected by a Covenant.**—There is another distinction in respect to covenants running with the land, which should be noticed before passing; that is, as between covenants which run with the land, binding assigns, as well as operating in their favor, without their being named, and such as require assigns to be named in order to be binding upon them.

[1] Martin v. Baker, 5 Blackf. 232.

[2] Waldo v. Hall, 14 Mass. 486.

[3] King v. Jones, 5 Taunt. 418.

[4] Van Horne v. Crain, 1 Paige, 455.

[5] Bedford v. Terhune, 30 N. Y. 460; Patten v. Deshon, 1 Gray, 329; Norman v. Wells, 17 Wend. 136.

[6] Quackenboss v. Clarke, 12 Wend. 555. Nor can the lessor maintain an action for use and occupation against the under-tenant, unless under agreement. Jennings v. Alexander, 1 Hilt. 154.

[7] Jackson v. Laughhead, 2 Johns. 75; Jackson v. Rowland, 6 Wend. 666.

This distinction seems to depend upon whether the subject-matter of the covenant is *in esse* or not, at the time of the demise. If the covenant relates to a thing *in esse*, as if it be to repair a building then on the premises, it will bind the assignee, whether named or not. But if the subject-matter is not *in esse*, as if it be to build a new house or wall upon the demised premises, the assignee is not bound, unless expressly named in the lease.[1] The questions growing out of this distinction border closely on the line between real and personal covenants, which does not seem to be very clearly defined. Such questions must, therefore, rest to a considerable extent upon the discretion of the court, and the intention of the parties as expressed in the lease.[2]

§ 351. **The Covenants usually Inserted in Leases on the part of the Lessor, are,** for quiet enjoyment, to repair, and to renew the lease.[3]

§ 352. **The Covenant for Quiet Enjoyment,** as we have seen, is that the tenant shall have the quiet enjoyment and possession of the premises during the continuance of the term.[4] By it, when general in its terms, the covenantor stipulates, at all events, to indemnify the covenantee against all acts committed by virtue of a paramount title.[5] But the covenant does not extend to the acts of a stranger. All that it requires is, that the lessor shall have such a title at the time of the demise as shall enable him to make a good un-

[1] Platt on Cov. 466, 471; Spencer's Case, 5 Coke, 16.

[2] Congleton v. Pattison, 10 East, 138. But if the covenant is not of a nature that the law permits it to be attached to the estate, it cannot become so by the agreement of the parties. Masury v. Southworth, 9 Ohio St. 340. Whether a covenant to deliver up would run with the land, was doubted in Sargent v. Smith, 12 Gray, 426, and denied in Doe v. Seaton, 2 Cromp. M. & R. 730.

[3] See 16 Cent. L. J. 362.

[4] In a lease a covenant for quiet enjoyment is implied. Field v. Herrick, 10 Ill. App. 591.

[5] Platt on Cov. 313; Playter v. Cunningham, 21 Cal. 229; Underwood v. Birchard, 47 Vt. 305. A covenant in a lease, that the lessee shall hold and occupy the demised premises for a certain time, amounts to a general covenant for quiet enjoyment during the term. Ellis v. Welsh, 6 Mass. 246.

incumbered lease for the term demised.[1] But any interference with the possession of the lessee by the lessor, except a mere trespass, will amount to a breach of the covenant in whatever form.[2] Though, it is to be remembered that the covenant may be limited by its terms, as where it is against the acts of a particular person, in which case a molestation by that person only will constitute a breach.[3]

§ 353. **A Covenant to Repair** is sometimes inserted in a lease on the part of the landlord; but unless he binds himself by an express agreement to that effect, he is under no obligation to repair the premises.[4] It has been held that where the landlord only rented a portion of the premises and retained the possession, occupancy and control of the balance, he was liable to one injured, while rightfully passing over the portion in his possession, by reason of a defect therein.[5] And this rule has been extended to a passage way over staircases and entries used by the lessee in common with the landlord and the other tenants in the same building.[6] But to the extent to which these cases seem to hold that the landlord is, in the absence of a covenant to repair, obliged to keep in a safe and good condition

[1] Gardner v. Keteltas, 3 Hill, 330; Knapp v. Marlboro, 34 Vt. 235; Playter v. Cunningham, 21 Cal. 229; Rantin v. Robertson, 2 Strobh. 366; Underwood v. Birchard, 47 Vt. 305.

[2] Mayor v. Mabie, 13 N. Y. 151.

[3] *Ante* § 344.

[4] Doupe v. Gennin, 37 How. Pr. 5; Fowler v. Bott, 6 Mass. 63; Taylor's Landl. & Ten., 7th ed., 274; Purcell v. English (Ind.), 16 Cent. L. J. 230; Bowe v. Harrisburg, 135 Mass. 38; Weinstine v. Harrison, 66 Tex. 546; Rogan v. Dockery, 23 Mo. App. 313; Hughes v. Vanstone, 24 Mo. App. 637. A landlord who has not covenanted to repair is not liable to his tenant for damages caused by water negligently allowed to run by another tenant of the story above. Greene v. Hague, 10 Ill. App. 598. Express covenants to repair are not to be enlarged beyond their fair intent. Clark v. Babcock, 23 Mich. 164; Witty v. Matthews, 52 N. Y. 512.

[5] Camp v. Wood, 76 N. Y. 92; Edwards v. N. Y. & H. R. Co., 98 N. Y. 25.

[6] Looney v. McLean, 129 Mass. 35; Woods v. Naumkeag S. C. Co., 134 Mass. 357.

the approaches, access and common stairway to a tenement, they have been contradicted, and the weight of authority is that where a stairway connected with apartments hired in a tenement house, occupied by several tenants, is rendered unsafe by temporary causes, the landlord is not liable, in the absence of a covenant on his part, to keep the premises in repair.[1] And the law may be fairly stated that, in the absence of any secret defect, deceit, warranty, or agreement on the part of the landlord, he cannot be held liable to the tenant, or any one rightfully occupying under him for an injury caused by the premises getting out of repair, unless it be by reason of his own wrongful act or failure to perform a known duty.[2] Nor is it in the power of the tenant to make repairs at the expense of the landlord, even though the premises have become uninhabitable for want of repair.[3] And a tenant, unless there is an express agreement to the contrary, or the landlord is under a covenant to repair, is obliged to continue to pay rent during the term, although the premises may have burned down in the meantime.[4] Some qualifications, however, have been placed upon the above doctrine by statute, and by the decisions of the courts in some of the States.[5] And in Louisiana a

[1] Humphrey v. Wait, 22 U. S. C. C. 580; Purcell v. English, 86 Ind. 34; Cole v. McKey, 66 Wis. 500. But see Ingwersen v. Rawkin, 47 N. J. Law, 18; Rawkin v. Ingwersen (N. J.), 10 Atl. Rep. 545.

[2] Carstairs v. Taylor, L. R. 6 Exch. 222; Dutton v. Gerrish, 9 Cush. 89; Brewster v. McFremery, 33 Cal. 341; Krueger v. Ferrant, 29 Minn. 385; Cole v. McKey, 66 Wis. 500; Gilloon v. Reilly (N. J.), 11 Atl. Rep. 481. And see Clifford v. Atl. Cotton Mills (Mass.), 15 N. E. Rep. 84.

[3] Casad v. Hughes, 27 Ind. 141; Mumford v. Brown, 6 Cow. 475; Witty v. Matthews, 52 N. Y. 512; Benjamin v. Heeney, 51 Ill. 492; Elliott v. Aiken, 45 N. H. 30; Morris v. Tillson, 81 Ill. 607; Kline v. Jacobs, 68 Pa. St. 57.

[4] Watts v. Coffin, 11 Johns. 495; Moffatt v. Smith, 4 N. Y. 126; Tibbits v. Percy, 24 Barb. 39; Leavitt v. Fletcher, 10 Allen, 121.

[5] Laws of New York, 1860, p. 592. The rule has been so modified by statute in New York as to give the tenant the option of surrendering possession of premises destroyed by fire and declaring his lease at an end. Smith v. Kerr, 108 N. Y. 31. The doctrine acted on by the courts of South Carolina is that, where there is a substantial destruction of the subject-matter out of which rent is reserved in a lease for years, by an

different rule prevails, where it is held that a lessor is bound to keep the premises in a fit condition to be used for the purposes for which they were leased.[1]

Where the landlord has expressly covenanted to repair the premises, the obligation will, everywhere, be enforced.[2] And if he sues for rent, the tenant may recoup any damages he may have sustained by reason of the landlord's breach. Though in case the premises are destroyed by fire, or any casualty, the tenant is bound to continue the payment of rent while the premises are rebuilding; provided, there is no unnecessary or unreasonable delay on the part of the landlord in rebuilding, after he has been notified of the destruction of the premises.[3] When the landlord covenants to repair, it is customary to insert a reservation of a right to enter the premises to make such repairs. The fact

act of God or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder be discharged from payment of rent. Coogan v. Parker, 2 S. C. 255. In Georgia, a landlord is generally bound to keep the premises in repair, and may be held liable to third persons for an injury sustained through a defect in repair; but not for injury occasioned by the tenant's negligence or wrongful use of the leased premises. White v. Montgomery, 58 Ga. 204. This rule does not extend to patent defects. Driver v. Maxwell, 56 Ga. 11. And see Stimsons Amer. Stat. § 2061.

[1] Coleman v. Haight, 14 La. Ann. 564.

[2] Prescott v. Otterstatter, 85 Pa. St. 534. When certain repairs are agreed to be done during the tenancy, no time being indicated, a notice to perform from the tenant is requisite to put the landlord in default. Gerzebek v. Lord, 33 N. J. L. 240. When the lessor covenants to make certain repairs, and no time is specified when such repairs are to be made, the law will presume that they are to be made in a reasonable time. Lunn v. Gage, 37 Ill. 19. In case of failure to repair, the tenant may make them, and charge the expense to the landlord. Hexter v. Knox, 63 N. Y. 561. A covenant by lessor to make all necessary repairs upon the outside of buildings, is broken by his failure to rebuild a stable burned on the premises. Crocker v. Hill, 61 N. H. 345.

[3] Loader v. Kemp, 2 Car. & P. 375. Where a lease contains a condition that, in case the demised premises are so damaged by fire as to be untenantable, the rent shall cease until the same shall be put in good repair, the fact that the tenant, or a subtenant, continues to occupy a portion of the premises after a fire, is not, of itself, conclusive evidence that the premises are tenantable. Evidence of the circumstances which induced the tenant to remain is proper. Kip v. Merwin, 52 N. Y. 542.

that they are necessary does not, without such a reservation, justify his entry.

§ 354. **A covenant to renew the lease** is a covenant whereby the lessor binds himself to make another lease of the premises, at the expiration of the term, either to the lessee or his assigns, for the same or some other period mentioned. The landlord is not bound to renew without a covenant for the purpose, unless by some agreement to that effect he has induced the tenant to make improvements upon the premises, in which case equity will interfere to prevent the landlord from putting an end to the tenancy.[1] A covenant to renew does not require that the renewal lease shall contain a similar covenant of renewal.[2] Even a covenant to "renew under the same covenants" is satisfied by a renewal omitting the covenant to renew.[3] Covenants by the landlord for continual renewals are not favored, for they tend to create a perpetuity;[4] but when they are explicit, the weight of authority is in favor of their validity.[5] A covenant to renew the lease at the end of the term runs with the land, and may be enforced by the assignee of the lease against the grantee of the reversion.[6]

Parties stipulating for the renewal of a lease should specify in the covenant the duration of the term, the amount

[1] Pilling v. Armitage, 12 Ves. 78; Robertson v. St. John, 2 Bro Ch. 140.

[2] Piggott v. Mason, 1 Paige, 412; Abeel v. Radcliff, 13 Johns. 297. A covenant to renew a lease at a certain rent, does not carry any of the covenants of the old lease with it. Willis v. Astor, 4 Edw. Ch. 594; Ryder v. Jenny, 2 Robt. (N. Y.) 56. The word "renew" imports the giving of a new lease like the old one, on the same terms except the renewal covenant. Cunningham v. Pattee, 99 Mass. 248. And see Creighton v. McKee, 2 Brews. (Pa.) 383.

[3] Carr v. Ellison, 20 Wend. 178; Tracy v. Albany Exch. Co., 7 N. Y. 472.

[4] Morrison v. Rossignol, 5 Cal. 64. Payment of rent when it becomes due, and performance of other covenants of a lease, under which a tenant is in possession of leased premises, with the privilege of renewing the lease at the end of the term, are conditions precedent to the exercise of the right of renewal. Behrman v. Barto, 54 Cal. 131.

[5] Blackmore v. Boardman, 28 Mo. 420; 4 Kent's Com. 109; Taylor's Landl. & Ten., 7th ed., § 333; Page v. Esty, 54 Me. 319.

[6] Piggott v. Mason, 1 Paige, 412.

of rent, and all particulars of the agreement. Although a covenant to renew will, perhaps, imply the same terms and rent, a covenant to renew upon such terms as might be agreed upon would be void for uncertainty.[1] But a lease containing a provision that, on certain conditions, it shall be renewed for a further term, continues on the tenant's compliance with the conditions, upon all the covenants and agreements of the former lease without the execution of any new lease.[2] It may be added here, that in the absence of an agreement the law imposes no obligation on a landlord to pay the tenant for improvements made during his term.[3]

Insolvency,[4] fraud or misrepresentation,[5] waste, or a breach of covenant,[6] on the part of the covenantee, will generally prevent the entry of a decree for specific performance of a covenant of renewal. And if the tenant is guilty of laches in demanding a renewal, equity will not, in general, aid him.[7]

[1] Rutgers v. Hunter, 6 Johns. Ch. 215: Whitlock v. Duffield, 1 Hoff. Ch. 110. A covenant to renew an under-lease in these words: "And the said lessors do promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended." held to be void for indefiniteness. Cunningham v. Pattee, 99 Mass. 248. And see Crawford v. Kastner, 63 How. Pr. 90; McAdoo v. Callum, 86 N. C. 419.

[2] House v. Burr, 24 Barb. 525; Raulet v. Cook, 44 N. H. 512; Brown v. Parsons, 22 Mich. 24. When a lessee has performed the conditions which entitle him to a renewal of the lease, and the landlord refuses to renew, the lessee has a right to elect whether he will proceed at law for damages, or in equity for specific performance. Arnot v. Alexander, 44 Mo. 25.

[3] Kutter v. Smith, 2 Wall. 491.

[4] Buckland v. Hall, 8 Ves. 92.

[5] Pendred v. Griffith, 1 Bro. P. C. 314.

[6] Hill v. Barclay, 18 Ves. 63; Behrman v. Barto, 54 Cal. 131.

[7] Where a lease for five years contained a covenant to renew for five years, if it should be desired by the lessee, it was held, that the lessee was bound to declare his election before the expiration of the first lease, and that having neglected to do so until two days afterwards, equity would not interfere for his relief. Renoud v. Daskam, 34 Conn. 516. Where a lease for two years provided for "an additional term of one, two, or three years after the expiration of said term of two years, at the election of the

§ 355. **Covenants against Incumbrances and for further Assurance,** are usual and important covenants, especially in long term or perpetual leases; but as these covenants have been treated at some length in a previous chapter, it is not considered necessary to add to what has already been said in respect to them.[1]

§ 356. **The Usual Covenant on the part of the Lessee** are, to pay rent, to pay taxes, to insure, not to carry on an offensive trade, not to assign or underlet without leave, and to deliver up the premises and fixtures in good repair at the end of the term.

§ 357. **A Covenant to Pay Rent** is usually inserted in every well drawn lease, besides the reservation of rent contained in the premises. Though, if there is no agreement between the parties, the law will, as we have seen, imply a promise on the part of the tenant to pay a fair rent; but this obligation would be incumbent upon him only so long as he continued to hold the premises.[2] In the absence of an express covenant on the part of the lessee, he may, by assigning his term, discharge himself from all future responsibility, even though the transfer might be to a beggar.[3] While, upon an express covenant the lessee would continue to be bound by his contract, notwithstanding he should assign over the lease,[4] and the assignee would also become liable in consequence of his priority of estate. For this

said party of the second part," it was held that there could be but one election, whether for one, two or three years. Falley v. Giles, 29 Ind. 114. Relief was granted where the tenant of a term for 99 years failed to obtain a renewal within the term, according to the literal wording of the covenant for renewal; but it was stated that gross *laches* would bar relief. Banks v. Haskie, 45 Md. 207.

[1] *Ante*, §§ 166, 172.

[2] Where a tenant, without written notice or consent of the landlord, abandons the possession of premises verbally leased to him, his liability for rent continues for whatever period may elapse before the tenancy becomes terminated by written notice or until possession may be accepted by the landlord. Rollins v. Moody, 72 Me. 135.

[3] *Ante*, § 350.

[4] Wilson v. Gerhardt (Colo.), 13 Pac. Rep. 705; Oswald v. Fratenburgh (Minn.), 31 N. W. Rep. 173.

reason a covenant to pay rent is always desirable for the protection of the landlord. It is a covenant running with the land, binding assigns, whether named or not.[1]

The covenants implied by law admit of a more liberal construction than express covenants, and may be made to conform to good conscience; but when a party, by his own contract, assumes a liability and makes no provision for accidents, he is presumed to have taken the risk upon himself, and will be held to make good his contract, notwithstanding he is deprived of its benefits by inevitable accident. Thus, where a tenant has failed to protect himself by a saving clause in the lease, or unless the lessor has covenanted to rebuild and failed to perform his covenant, the tenant is bound to continue to pay rent after the destruction of the tenement by fire or other casualty.[2] This is the prevailing doctrine in the United States, as well as in England. The authorities, however, indicate an exception to this rule where the lease is of an upper story or basement or apartment in a building, because in such case it is not the intention of the lease to grant any interest in the land further than is necessary for the enjoyment of the rooms so demised, and when these are destroyed there is nothing upon which the demise can operate.[3] For the protection of the tenant, therefore, a proviso is usually attached to his covenant to pay rent, to the effect that if the premises shall be partially damaged by any casualty, or from any cause whatever, without any fault or neglect

[1] Main v. Feathers, 21 Barb. 646; Dolph v. White, 12 N. Y. 296; Harmony Lodge v. White, 30 Ohio St. 569.

[2] Moffatt v. Smith, 4 N. Y. 126; Fowler v. Payne, 49 Miss. 32; Leavitt v. Fletcher, 10 Allen, 121; Coy v. Downie, 14 Fla. 544; Witty v. Matthews, 52 N. Y. 512; Helburn v. Mofford, 7 Bush (Ky.), 169. And equity will not relieve him from the performance thereof. Robinson v. L'Engle, 13 Fla. 482.

[3] McMillen v. Solomon, 42 Ala. 356; Graves v. Berdan, 26 N. Y. 498; Winters v. Cornish, 5 Ohio, 477; Stockwell v. Hunter, 11 Metc. 448; Ainsworth v. Ritt, 38 Cal. 89; Shawmut Nat. Bank v. Boston, 118 Mass. 128; Whitaker v. Hawley, 25 Kan. 674; Harrington v. Watson, 11 Oreg. 143; *s. c.*, 50 Amer. Rep. 465. For other exceptions to the above rule, see *supra*, § 353.

upon his part, the same shall be repaired as speedily as possible, at the expense of the landlord; and that in case the damage shall be so extensive as to render the premises untenantable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth the lease shall, at the option of the tenant, cease and come to an end. A provision, simply, that the rent should cease in case the premises became uninhabitable by "fire or other casualty," was held not to extend to a case where the building became untenantable in consequence of its being taken down under an ordinance of the city for widening the streets.[1] It may be stated as a general proposition, that after the relation of landlord and tenant has been once established, the tenant can only resist a demand for rent by showing that he was evicted, or was otherwise legally entitled to quit, under the terms of his lease, or that the landlord has accepted another person as tenant in his stead.[2] If the tenant at any time be deprived of the premises by the agency or interference of the landlord, the obligation to pay rent ceases, because the enjoyment of the premises is the consideration

[1] Mills v. Baehr's Ex., 24 Wend. 254. And see Kip v. Merwin, 2 N. Y. Superior Court, 531.

[2] Cleves v. Willoughby, 7 Hill, 83; Taylor's Landl. & Ten., 7th ed., § 372. Covenants on the part of the landlord to make repairs and additions are subordinate to those of the tenant to pay rent, and do not defeat the rent *in toto*, unless the tenement is worthless for the purpose for which it was rented without such additions and improvements. Prescott v. Otterstatter, 85 Pa. St. 534. If one lets a house fraudulently concealing from the tenant his knowledge of the dangerous condition of the drains and the tenant is compelled to leave the house, he is not bound to pay rent. Crump v. Worrell, 12 Phila. 249. A lessee before taking the lease proposed to institute an examination concerning drainage and plumbing but was deterred by the lessor's false and fraudulent representations that these matters were all right: Held, that when sued for rent the lessee could defend by showing payment for plumbing, etc., exceeding the rent. Wolfe v. Arrott, 109 Pa. St. 473. And see Stubblefield v. Soule, 21 Ill. App. 154.

from which the obligation derives its force.[1] Or, if the land be recovered by a third person under a paramount title, the tenant is discharged from his obligation to pay rent, after he has been evicted. And if the tenant is evicted from a part of the premises only, by a stranger, such eviction operates as a discharge of a proportionate part of the rent.[2] But if the lessor wrongfully deprives the tenant of any part of the demised premises, it discharges him from payment of the whole rent, until he is restored to the enjoyment of the entire premises.[3] Though, where the landlord does acts merely tending to diminish the beneficial enjoyment of the premises, and the tenant continues to occupy them, he is bound to pay rent;[4] and where there has been an eviction, the tenant must pay the rent accruing up to the time he actually quit the premises.[5] In order to constitute an eviction, it is not necessary that the tenant be actually expelled from the premises. Many acts done by the landlord, tending to diminish the enjoyment of the premises, have been held sufficient to authorize the tenant to quit the possession, and to exonerate him from the payment of rent: such, for instance, as the erection of a nuisance, so near the premises as to deprive the tenant of the use of them, or letting adjoining premises to be occupied as a place of prostitution, and the like.[6] But to constitute an eviction, the acts complained of must proceed from the landlord, and

[1] Pendleton v. Dyett, 4 Cow. 581; Tio v. Vance, 11 La. 200; Halligan v. Wade, 21 Ill. 470.

[2] Carter v. Burr, 39 Barb. 59; Lansing v. Van Alstyne, 2 Wend. 561.

[3] Fitchburg Co. v. Melven, 15 Mass. 268; Day v. Watson, 8 Mich. 535; Bennet v. Bittle, 4 Rawle, 339; Eldred v. Leahy, 31 Wis. 546; Hayner v. Smith, 63 Ill. 430.

[4] Edgerton v. Page, 20 N. Y. 281; Collins v. Karatopsky, 36 Ark. 316.

[5] Fitchburg Co. v. Melven, 15 Mass. 268; Kessler v. McConachy, 1 Rawle, 435.

[6] Cohen v. Dupont, 1 Sandf. 260; Pendleton v. Dyett, 4 Cow. 581. But see De Witt v. Pierson, 112 Mass. 8. An eviction by the landlord is not a mere trespass, but something of a grave and permanent character done by him with the intention of depriving the tenant of the leased premises. Rice v. Dudley, 65 Ala. 68.

not from a stranger to the lease.[1] Where a lease under seal fixes a certain amount of rent to be paid each month, a parol agreement changing the amount of rent to be paid for the unexpired term, and leaving the lease in other respects unchanged and in force, is not binding upon the lessor; and he will, notwithstanding such parol agreement, be entitled to recover the amount of rent called for by the lease.[2]

§ 358. **The Lessee sometimes Covenants to Pay Taxes** and other assessments charged upon the premises. When this is done, it is ordinarily taken into consideration in fixing the amount of rent. For, in the absence of an express agreement, as between the landlord and tenant of a term of years, the landlord is bound to pay the taxes.[3] Though, as a general rule, it is the duty of the tenant in the first instance to pay all taxes and assessments imposed upon the premises; and he may, for his own protection, do so, when demanded, and charge the same to account of rent, unless he has covenanted to pay such taxes or assessments in addition to the rent.[4] And if the sum paid by the tenant exceeds the amount of rent due, he may recover the excess of the landlord as money paid to his use.[5] If the lessee covenants to pay the taxes assessed upon the leased premises, and fails to do so, the lessor can recover the amount assessed, although he himself may not have paid such tax.[6] In respect to what would be included in the tenant's obligation to pay taxes, it has been held that a stipulation to pay all taxes and keep the sidewalks in repair, does not extend to the payment of the expenses of paving the street in front of the leased premises.[7] But, on the other hand, it has been held that a lessee's covenant to pay "all taxes, rates,

[1] De Witt v. Pierson, 112 Mass. 8.

[2] Barnett v. Barnes, 73 Ill. 216.

[3] Prettyman v. Walston, 34 Ill. 191. In Pennsylvania and Maryland the tenant is liable for taxes. Brightley's Purd. Dig., Landlord, Chs. 2 and 3; Md. Rev. Code 1878, Art. II., § 65.

[4] Hunt v. Amidon, 4 Hill, 349.

[5] Taylor v. Zamira, 6 Taunt. 524.

[6] Rector, etc. v. Higgins, 48 N. Y. 532.

[7] Twycross v. Fitchburg R. R. Co., 10 Gray, 293.

charges, and assessments, which shall or may from time to time, and at any time during the term be levied, assessed, or made on the demised premises, or in respect of the same for any cause whatever," binds him to pay a betterment assessed thereon, although the lease was made many years before the passage of any betterment laws.[1] And where, under a similar covenant, an improvement was made which took away a part of the leasehold premises, it was held that the lessee was chargeable with the full amount of the assessment, upon the whole interest of the lessor in such premises.[2] And it has been held that a covenant to pay "all taxes general and special" *prima facie* includes an assessment levied on the property to pay for the reconstruction of an adjoining street.[3]

§ 359. **A Covenant to Insure the Premises** in the joint names of the lessor and of the lessee, and, in case of fire, to lay out the insurance money in rebuilding or repairing the premises, is sometimes entered into on the part of the lessee. The covenant, when in this form, becomes a real covenant, running with the land to assignees, and, in case of fire, the landlord may require the insurance money to be applied in reinstating the premises; but a bare covenant to insure, which does not provide for the application of the insurance money to rebuilding the premises, is merely a personal covenant, extending only to the covenantor and his personal representatives, and, in general, gives the landlord

[1] Walker v. Whittemore, 112 Mass. 187; Simonds v. Turner, 120 Mass. 328. But these cases seem to have been decided upon the peculiarly broad and comprehensive wording of the covenant. It has been repeatedly held that an assessment, made under an act not in existence at the time of the execution of a lease, is not included in a tenant's covenant to pay taxes and assessments. See Love v. Howard, 6 R. I. 116; Oswald v. Gilfert, 11 Johns. 443; Bleecker v. Ballou, 3 Wend. 263. Where a lessee covenants to pay all assessments, he in fact agrees to pay such assessments only as are valid, or such as can be legally enforced against the lessor or against the property. Clark v. Coolidge, 8 Kan. 189.

[2] Astor v. Miller, 2 Paige, 68.

[3] Thomas v, Hooker Colville Pump Co., 22 Mo. App. 8.

no right to receive the insurance money from the insurer.[1] In some of the States, however, it is required by statute that the insurance money shall be so applied, in which case the effect is the same as if the provision were contained in the covenant.[2] A covenant to insure, and to keep a given sum of insurance upon the property, is broken if the premises are left uninsured for any time, however short.[3] And where the tenant is required to keep the building insured in the name of the landlord, an insurance in his own name is no compliance with the covenant.[4]

§ 360. **A Covenant not to Use the Premises for Purposes of Trade**, is usually inserted in leases of private dwellings in towns and cities. Sometimes the covenant is not to carry on a particular trade, or any trade that shall be offensive to the neighbors. Such covenants run with the land, and an assignee, though not named, will be liable to an action for damages, or to a forfeiture on the condition of re-entry, in the case of a breach.[5] Or a court of equity will enforce the covenant, and, by injunction, either regulate or restrain the occupation of the premises, as the circumstances may require.[6] In the absence of an express covenant limiting the beneficial use of the property, no such covenant will be implied. Nor will a covenant not to use the premises for any other purpose be inferred from a recital of the purposes for which the demised premises are let.[7] And where the covenant is not to carry on certain specific trades, it will not be construed as prohibiting any trade not speci-

[1] Taylor's Landl. & Ten., 7th ed., 348.

[2] Thomas v. Von Kapff, 6 Gill & J. 372; Masury v. Southworth, 9 Ohio St. 340.

[3] Doe v. Shewin, 3 Campb. 135.

[4] Keteltas v. Coleman, 2 E. D. Smith, 408. And see Sherwood v. Harral, 39 Conn. 333.

[5] Brouwer v. Jones, 23 Barb. 153.

[6] Howard v. Ellis, 4 Sandf. 369.

[7] Brugman v. Noyes, 6 Wis. 1. But see De Forest v. Byrne, 1 Hilt. 43. If the covenant were to use the premises in a particular way, or for a particular purpose, it would, of course, be otherwise. Steward v. Winters, 4 Sandf. Ch. 587.

fied.[1] If the lessee exercises a trade upon the demised premises by which the lease is forfeited, the mere fact of the lessor suffering such tenant to carry on the trade, does not waive the forfeiture; but if he permits the tenant to go on and make improvements upon the premises, which are necessary to adapt them for trade, this may be evidence of his consent to their being occupied.[2]

§ 361. **Covenants not to Assign or Underlet** are not favored in law, being looked upon by the courts as prejudicial to the interests of commerce, and are, therefore, strictly construed.[3] A covenant against assignment should, if intended to prohibit underletting, be expressly worded to that effect, as a covenant merely "not to assign, transfer, or set over," is construed not to prevent the lessee from underletting.[4] So a covenant "not to let or underlet the whole or any part of the premises," will not preclude an assignment of the whole interest.[5]

A covenant not to assign is not broken by a deposit of the lease by way of security for money lent, since this is not a parting with the legal interest.[6] Nor does the cove-

[1] Simons v. Farren, 1 Bing. New. Cas. 126.

[2] Doe v. Allen, 3 Taunt. 71.

[3] In some of the States by statute a tenant cannot underlet or assign without landlord's consent. Texas Rev. Stat. 1879, § 3122; Ga. Code 1882, § 2279.

[4] Copland v. Parker, 4 Mich. 660; Jackson v. Silvernail, 15 Johns. 278. A covenant not to assign for the benefit of creditors is not broken by an assignment not for creditors. Philadelphia & E. R. R. v. Catawissa R. R., 53 Pa. St. 20. Where lands are leased in fee, the lessor, having no reversion, cannot restrain the power of alienation. De Peyster v. Michael, 6 N. Y. 467.

[5] Lynde v. Hough, 27 Barb. 415; Taylor's Landl. & Ten., § 406; Field v. Mills, 33 N. J. L. 254, contradicting Greenaway v. Adams, 12 Ves. 395. In the absence of a stipulation to the contrary, a tenant has a right to sublet the premises to another, to be used in any manner not inconsistent with the terms of his own lease. Crommelin v. Thiess, 31 Ala. 412. It is otherwise, by statute, in Georgia. McBurney v. McIntyre, 38 Ga. 261. Covenant not to sublet is not broken by lessee's agreement to allow third person to place sign upon wall of leased building. Lowell v. Strahan, 145 Mass. 1; Riddle v. Littlefield, 53 N. H. 503.

[6] Doe v. Hogg, 4 Dow. & Ry. 226.

nant apply to any involuntary alienation by operation of law:[1] but such an operation of the law may be guarded against by the terms of the contract, and a provision is frequently inserted for that purpose, to the effect that the lease shall cease upon being taken on execution, or otherwise passing out of the possession of the lessee.

This is not a covenant which will run with the land; for the mere idea of a covenant running with the land supposes an assignment, which it is the object of the covenant to prevent. When a license has once been given, the assignee takes the estate discharged of the covenant, and no forfeiture will be incurred by any subsequent assignment.[2] And this is, moreover, true, because a proviso or condition cannot be divided or apportioned by an act of the parties. So, if a lease be made to two or more persons with a proviso that they or either of them shall not alien without license, and the lessor licenses one, this discharges the condition as to all. Or if the license is as to a part of the premises only, the restriction is thereby removed as to the residue.[3] But such a covenant may be inserted for the purpose of controlling, and not to prohibit assignments, in which case, if properly framed, it would run with the land.[4] And the rule that a license once granted removes the condition forever, may also be controlled by the express contract of the parties.

§ 362. **The Lessee's Covenant to Deliver up the Premises in Good Repair.**—The lessee's covenants usually terminate by a general undertaking on his part to deliver up the possession of the premises at the expiration of the lease, in as good repair as the same are in at the date of the lease, natural wear and damage by the elements excepted. Under this covenant, or one of equivalent significance, unless there is a covenant to repair or rebuild, and the buildings

[1] Smith v. Putnam, 3 Pick. 221; Jackson v. Corliss, 7 Johns. 531.

[2] Jones v. Jones, 12 Ves. 186; Murray v. Harway, 56 N. Y. 337; Chipman v. Emeric, 5 Cal. 49; McCormick v. Stowell, 138 Mass. 431.

[3] Leeds v. Compton, 1 Roll. Abr. 472.

[4] Smith's Land[1] & Ten. 119.

are destroyed by fire, the tenant is not bound to put up new buildings in the place of those destroyed.[1] But where the lessee's covenant to repair excepted "damages by the elements or acts of Providence," damages to which human agency contributes in any way are not within the exception.[2] A covenant "to keep up all repairs" does not bind the lessee to insure against natural wear and decay, but only to do ordinary repairs.[3] Nor does a covenant to keep the premises "in good repair and leave them in the same good order at the end of the term," require them to be put and left in better repair than they were in at the date of the covenant.[4] The covenant sometimes includes an agreement to surrender all improvements placed upon the premises during the term by the lessee, in which case it will then embrace every addition, alteration, erection, or annexation made by the lessee during the term, to render the premises more available, profitable or useful and convenient.[5] The

[1] Miller v. Morris, 55 Tex. 412; *s. c.* 40 Amer. Rep. 814; Warren v. Wagner, 75 Ala. 188. A stipulation in a lease "to repair and deliver up" binds the lessee to rebuild in case of loss by fire during the term, but a stipulation "to deliver up" simply imposes an obligation against holding over. Nave v. Berry, 22 Ala. 382. But under a covenant to surrender in good condition, the tenant is liable for waste, although resulting from accident occurring without fault of the tenant. Parrott v. Barney, 2 Abb. (U. S.) 197. In some States by statute no general covenant to repair shall bind him to re-erect or repair building destroyed by accidental fire. Stimson's Amer. Stat., § 2045. Under a covenant in a lease for the lessee to keep the premises "in a good state of repairs," *Held*, that he was bound to restore buildings destroyed by fire. David v. Ryan, 47 Iowa, 642.

[2] Polack v. Pioche, 35 Cal. 416.

[3] Harris v. Coulbourn, 3 Harr. (Del.) 338.

[4] West v. Hart, 7 J. J. Marsh. 258.

[5] French v. The Mayor, 16 How. Pr. 220; Harris v. Kelly (Pa.), 13 Atl. Rep. 523. A tenant may at any time before the expiration of his term remove buildings or improvements placed by him upon the demised premises; but if he omit to remove them until his right of enjoyment ceases, such will be deemed an abandonment, and they become a part of the real estate. Dostal v. McCaddon, 35 Iowa, 318; Heffner v. Lewis, 73 Pa. St. 302; Cromie v. Hoover, 40 Ind. 49. Where by the terms of a lease, the lessee is permitted to erect houses on the leased lots with privilege of removal, the mere fact that the houses are suffered to remain after the expiration of the lease and pending litigation does not

lessor sometimes covenants to pay for improvements made by lessee during the term. In such case it has been held that the covenant runs with the land and binds the lessor's assignee.[1] If there be any fixtures attached to the demised premises, and they become severed by fire, they do not lose their identity, but are the property of the landlord, and the tenant is liable to an action if he carries them away.[2]

work a forfeiture of the houses. Atkinson v. Dixon (Mo.), 10 S. W. Rep. 162.

[1] Ecke v. Fetzen, 65 Wis. 55.

[2] Warner v. Hitchins, 5 Barb. 666.

CHAPTER VII.—The Execution, Assignment and Determination of Leases.

Article I. Of the Execution of Leases.
II. Of the Assignment of a Lease.
III. The Modes of Determining a Tenancy.

ARTICLE I.

OF THE EXECUTION OF LEASES.

SECTION.
364. How leases are made and executed, to be valid.
365. In what the execution of a lease consists.
366. Of the execution of leases by agents.
367. Leases usually by indenture—requisites of execution.

§ 364. **How Leases are made and Executed, to be Valid.**—We have seen that, at common law, a term of years could be created either by deed, by writing not under seal, or by parol.[1] But a lease of a separate incorporeal hereditament was always required to be made by deed;[2] and in England all leases required by law to be in writing are now required to be by deed.[3] The Statute of Frauds[4]

[1] *Ante*, § 294.
[2] Williams on Real Prop. 362.
[3] Stats. 8 and 9, Vict., ch. 106, § 3.
[4] 29 Car. II, ch. 3.

declares, among other things, that all leases for more than three years, not put in writing and signed by the parties, shall have the force and effect of estates at will only. This statute, with some modifications, has been adopted in all of the States;—the time for which parol leases are binding varying in the different States from one to seven years.[1] Under this statute it seems to be sufficient that the lease be in writing, though not under seal.[2] But in many of the States, leases, exceeding a certain number of years, are required to be by deed;[3] and in order to be valid against third persons without notice, must be executed, acknowledged and recorded with the same formality as a conveyance of the freehold.[4] But, as between the parties and purchasers with notice, a lease is valid, without being acknowledged and recorded.[5]

[1] Kentucky, 1 year: Gen. Stats. 1873, p. 257, § 16; Minnesota, 1 year; Stats. 1873, Vol. 1, p. 692, § 10. Mississippi, 1 year: Rev. Code 1871, § 2302. Nebraska, 1 year; Gen. Stats. 1873, p. 872, § 1. New Jersey, 2 years; Rev. Stats. 1874, p. 92, § 9. Rhode Island, 1 year; Gen. Stats. 1872, p. 350; West Virginia, 5 years; Code 1870, p. 459. In some of the States, viz., Ohio, New Hampshire, Missouri, Massachusetts, Maine, Vermont and Indiana, all leases not in writing have the force and effect of estates at will only. Taylor's Landl. & Ten., 7th ed., § 29; Rev. Stats. Mo. 1879, § 2509.

[2] Den v. Johnson, 15 N. J. L. 116; Allen v. Jaquish, 21 Wend. 635; Olmstead v. Niles, 7 N. H. 526.

[3] In Massachusetts and New Hampshire a lease for more than seven years must be by deed. Gen. Stats. Mass., ch. 89; Gen. Stats. New Hampshire 1867, p. 252, § 4. In Minnesota, leases for a term exceeding one year must be by deed or conveyance in writing. Stats. Minn. 1873, Vol. 1, p. 692, § 10. So, also, in Vermont, Gen. Stats. 1873, p. 448, § 7. In Virginia, if for a term of more than five years, it must be by deed. Code of Virginia 1873, p. 887, § 1.

[4] Rev. Stats. Maine 1871, p. 560, § 8; Gen. Stats. Vermont, p. 448, § 7; Taylor's Landl. & Ten., 7th ed., § 171; Brohawn v. Van Ness, 1 Cranch C. C. 366; Locke v. Coleman, 4 T. B. Mon. 315; Richardson v. Bates, 8 Ohio St. 260.

[5] Lake v. Campbell, 18 Ill. 106; Town of Lemington v. Stevens, 48 Vt. 38; Johnson v. Phœnix Mut. Life Ins. Co., 46 Conn. 92; Kittle v. St. John, 10 Neb. 605. An unacknowledged and unrecorded lease is valid as to one who has actual notice. Wihelm v. Mertz, 4 Greene (Iowa), 54; Tuttle v. Jackson, 6 Wend. 213; State of Connecticut v. Bradish, 14 Mass. 296; Porter v. Cole, 4 Greenl. 20; Colby v. Kenniston, 4 N. H. 262; Jackson v. Winslow, 9 Cow. 13.

§ 365. **The Execution of a Lease consists** in the signatures, and if it be by deed, the seals of the parties and the delivery of the instrument.[1] In some of the States one, and in others two witnesses are required, and in several of the States, as we have seen, leases exceeding a certain number of years, in order to secure the priority to which they may be entitled, must be acknowledged, or proved and recorded in the same manner as other deeds of real estate are required to be recorded. Each of these topics has been discussed under separate heads, and very little need be added to what has already been said upon either subject, as the same general principles relative to execution and delivery apply alike to all deeds, whether they convey a mere chattel interest or the fee. In respect to the signature of a firm, it has recently been held in Massachusetts that an entry by two partners, under a lease to which one has signed the name of both, is a ratification thereof by the other.[2] In the absence of an express statute, no attesting witness is necessary to the validity of a deed.[3] And, as a general rule, recording acts do not invalidate deeds which have not been recorded, as between the parties.[4] But in Pennsylvania it was held that a lease of a married woman's estate, for any term, to be valid, must be acknowledged by her, separate from her husband.[5]

§ 366. **When Leases are Executed by an Agent,** caution must be observed in three things, namely: The authority must be sufficient, the agent must pursue his authority strictly, and must grant in the name of his principal.[6] The

[1] See Kelsey v. Tourtelotte, 59 Pa. St. 184.

[2] Holbrook v. Chamberlin, 116 Mass. 155.

[3] 4 Kent's Com. 449.

[4] *Ante*, §§ 249, 279. In Tennessee, a lease or an assignment of a lease for more than a year is valid, and passes the interest, although not proved and registered. Thomas v. Blakemore, 5 Yerg. 113. A lease is good as against the lessor, although not acknowledged, and if the lessee enters under it and conforms to its terms, the rights of the parties are to be governed thereby. Town of Lemington v. Stevens, 48 Vt. 38.

[5] Miller v. Harbert, 6 Phil. 531.

[6] Shep. Touch. 270.

authority of an agent to contract for a lease need not be in writing. To constitute a valid executory agreement, it is only necessary that the agent be lawfully authorized to contract.[1] But, to execute a lease under seal, the authority of the agent must, in general, be under seal.[2] Though, in some of the States, it seems that the appointment of an agent to execute a lease may be by parol,[3] while in others the English rule has been copied and adopted, which requires the writing sought to be availed of as a lease to be "signed by the parties, etc., making the same, or their agents thereunto lawfully authorized by writing." Under these statutes, a question has arisen as to the validity of a lease, signed by an agent in the presence of the lessor, and by his direction orally given. Some courts, by a strict construction of the statute, regard the authority as insufficient,[4] while in other States such an execution of a lease would be valid.[5] A lease under seal, executed by an agent in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although the fact of the agency is recited therein, and although it appears by extrinsic evidence that the lessor or lessee, as the case may be, acted as agent.[6] And, on the other hand, a deed signed by the attorney in the name and as the personal act of the principal, without anything to indicate that it was done by the agent, would not bind the principal.[7]

[1] McComb v. Wright, 4 Johns. Ch. 667. A town's authority to execute a lease is shown *prima facie* by its corporate seal affixed to the lease by the proper officer. Crescent City Wharf Co. v. Simpson (Cal.), 19 Pac. Rep. 426; *Ante*, § 7.

[2] *Ante*, § 230.

[3] See 1 Washb. on Real Prop., 4th ed., p. 448, and note.

[4] Wallace v. McCullough, 1 Rich. Eq. (S. C.) 427.

[5] Gardner v. Gardner, 5 Cush. 483.

[6] Kiersted v. Orange, etc. R. R. Co., 69 N. Y. 343; Seyfert v. Bean, 83 Pa. St. 450.

[7] Wood v. Goodridge, 6 Cush. 117. The doctrine of this case, though doubted as regards the execution by an agent of an ordinary writing, seems to be good both on authority and principle, as far as sealed instruments are concerned. See *ante*, §§ 245, 246, where this question is fully discussed as to deed.

§ 367. **Leases are usually by Indenture,** executed under the hand and seal of the respective parties, in which case, both parties are deemed originals.[1] The statutes of some of the States have been construed to require both parties to sign, in order to be bound by the contract.[2] But in other States, as we have seen, it has been held that a party to an indenture will become liable upon its covenants by accepting it, although he may not sign and seal the deed.[3] It may be added that an indenture must be delivered to both parties.[4]

ARTICLE II.

OF THE ASSIGNMENT OF A LEASE.

SECTION.

369. Assignment defined.
370. Who may make, and what will constitute an assignment.
371. An assignment is either in fact or in law.
372. Assignments in law.
373. Of an assignment in fact.
374. The proper covenants to be inserted in the assignment of a lease.
375. The effect of an assignment of a lease.
376. Continued—rights and liabilities of an assignee.
377. Of the assignee of the reversion.

[1] Lewis v. Payn, 8 Cowen, 71.

[2] Under the North Carolina Statute of Frauds, where the plaintiff proposed to lease certain real estate, upon certain terms, to defendant for ten years, which proposition was adopted and received by its board of councilmen, and entered upon their minutes; and thereafter a lease executed by plaintiff was tendered to and accepted by said board, but was never actually signed on the part of defendants, *held*, that the lease, or contract of lease itself must be signed by the party to be charged; that signing a memorandum of an agreement for a lease is not enough, and that the defendant was not bound by the contract. Wade v. Newbern, 77 N. C. 460.

[3] *Ante*, § 61. Where a corporation to whom a lease was made without any executed acceptance took possession of the premises and used them, it was held that the acceptance of possession was equivalent to an execution of the instrument in proper form. Fitton v. Hamilton City, 6 Nev. 196.

[4] A lease was prepared between the lessor and the lessee and his surety.

§ 369. **Assignment Defined.**—An assignment of a lease is the transfer of the entire interest held under it, and whether a conveyance by a lessee is an assignment or an under-lease, depends upon that fact. The essential nature of the conveyance is not affected by the particular words employed; but the test is whether the grant leaves a reversionary interest in the grantor, in which case it is a sublease, or operates as a transfer of his entire term, which constitutes an assignment.[1] Thus, a transfer by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent and the right of re-entry on covenant broken, is not an under-letting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate; it being one of the essentials of a lease that it shall contain a reversion in favor of the grantor.[2] Yet it has been held that an under-lease reserving the right to re-enter is a sublease, and that the lessee may re-enter for breach of the condition, although there is no reversion remaining in him.[3] And this view ap-

The lessee signed, took away and brought to the lessor the lease, with the surety's name signed thereto, but it was not then signed by the lessor. The lease was signed some days after by the lessor, but none of the other parties were present, and it was not delivered to the lessee afterwards. The lessee did not take possession of the premises. The court below charged that the lease was sufficiently proved, and was delivered to the lessee. *Held*, that the charge was erroneous. Kelsey v. Tourtelotte, 59 Pa. St. 184.

[1] Constantine v. Wake, 1 Sweeny (N. Y.), 239; Sanders v. Partridge, 108 Mass. 558; Hicks v. Downing, 1 Ld. Raym. 99. It was originally held, without any qualification, that an assignment of a lease is a violation of a stipulation not to underlet. Greenaway v. Adams, 12 Ves. 395. But the doctrine of that case has been criticised and rejected. Field v. Mills, 33 N. J. L. 255.

[2] Smiley v. Van Winkle, 6 Cal. 605; Stewart v. Long Island R. R. Co., 102 N. Y. 601. An agreement whereby a lessee sells to another the right to use and possess real estate as long as the lessee could, the rent to be paid to the latter, and he to pay the lessor, is, in legal effect, an assignment of the lease. Indianapolis Manufacturing Union v. C. C. C. & I. R. R. Co., 45 Ind. 281.

[3] People v. Robertson, 39 Barb. 9; Linden v. Hepburn, 3 Sandf. 668; Collins v. Hasbrouck, 56 N. Y. 157; Dunlap v. Bullard, 131 Mass. 161.

pears to be sustained by the current of authority, especially if an increased rent is reserved, or the terms of the instrument differ in any essential particular from the original lease.[1] And if any portion of the time is reserved to the lessee, even though it be but a day, it is a sublease, and not an assignment.[2] But if the lessee transfers to another, either with or without conditions, all of his interest in a portion of the demised premises, it is not a sublease, but an assignment *pro tanto;* and this, although the instrument is in form a lease.[3]

§ 370. **Who may Make, and what will Constitute an Assignment.**—Either of the parties to a lease may assign his interest without the consent of the other, unless restricted by some covenant or condition contained therein.[4] A lessee may also underlet for any less number of years than he himself holds.[5] The right of alienation is incident to the estate, and exists without the use of the word "assigns."[6] The policy of law favors the free alienation of property; hence, as we have seen, a restriction in a lease not to underlet is construed not to prevent an assignment, nor *vice versa*.[7] But although a lessee may assign his rights or interest in the premises, without the consent of his landlord, he cannot, as will be further noticed, thereby discharge his obligations, as that would unreasonably deprive the landlord of the benefit of a contract made with a particular tenant to whose care and responsibility he trusted

[1] Collamer v. Kelley, 12 Iowa, 319; Martin v. O'Conner, 43 Barb. 514; Townsend v. Read, 15 Abb. (N. Y.) N. Cas. 285. A transfer by a lessee of the entire term, reserving rent at a different rate and payable at a different time, with a provision for re-entry, is a sublease, and not an assignment. Collins v. Hasbrouck, 56 N. Y. 157.

[2] Davis v. Morris, 36 N. Y. 569; Crusoe v. Bugby, 3 Wils. 234; Post v. Kearney, 2 N. Y. 394.

[3] Woodhull v. Rosenthal, 61 N. Y. 382; Stewart v. Long Island R. R. Co., 102 N. Y. 601.

[4] Robinson v. Perry, 21 Ga. 183; Cooney v. Hayes, 40 Vt. 478.

[5] Cromelin v. Thiess, 31 Ala. 412. But held otherwise under Georgia Revised Code, § 2253. McBurney v. McIntyre, 38 Ga. 261.

[6] Robinson v. Perry, 21 Ga. 183; Nave v. Berry, 22 Ala. 382.

[7] *Ante*, § 361.

when he granted the lease. A grant by a lessee of his entire estate will operate as an assignment whether it be in form a lease, an assignment or a conveyance in fee.[1]

Where a lessee makes a general assignment of all his property "of every sort and description," for the benefit of his creditors, it is sufficiently comprehensive to pass to the trustees the grantor's interest in the term;[2] and, if accepted, renders the assignees liable for the payment of rent and the performance of the covenants.[3] But the trustees are entitled to a reasonable time to ascertain whether the leasehold property of the debtor can be made available for the benefit of the creditors; and until some specific act has been done, signifying their intention to accept the lease, the term remains in the bankrupt.[4] In New York, a mortgagee of a term, who has never taken possession, is not an assignee of the whole term, or liable for rent in arrears; the mortgage being but a security and the legal estate still remaining in the mortgagor.[5] But in those States in which the common-law doctrine of mortgage exists, a contrary rule prevails; as the mortgagee is held to be seized of the legal estate, he is liable as assignee, whether in possession or not.[6] The better opinion, how-

[1] 2 Prest. Conv. 124; Sanders v. Partridge, 108 Mass. 558; Sands v. Hughes, 58 N. Y. 293.

[2] Horwitz v. Davis, 16 Md. 313.

[3] Dorrance v. Jones, 27 Ala. 630.

[4] Briggs v. Sowry, 8 Mees. & W. 729.

[5] Tallman v. Bresler, 65 Barb. 369; Eaton v. Jaques, 2 Doug. 456; Walker v. Reeves, 2 Doug. 461.

[6] McMurphy v. Minot, 4 N. H 251. The latter has been regarded as the English doctrine since the decision of Williams v. Bosanquet, 3 Moore, 500, in which the case of Eaton v. Jaques, *supra*, was overruled. The courts of this country, however, generally incline toward the rule laid down in Eaton v. Jaques. See Jackson v. Willard, 4 Johns. 41; White v. Bond, 16 Mass. 400; Cushing v. Hurd, 4 Pick. 253. In the case of Astor v. Hoyt, 5 Wend. 603, decided after the case of Williams v. Bosanquet, and in which the latter case was considered and commented upon, the Supreme Court of New York declared the law to be "that a mortgagee of a term, not in possession, cannot be considered as an assignee, but if he takes possession of the mortgaged premises, he has

ever, seems to be, that the mortgagee must gain possession of the mortgaged premises before he can compel the tenant to pay him the rent.[1]

A general grant of the reversion passes all leases to which the property is subject, including the rents reserved, as incident to the grant.[2] And it matters not whether the conveyance be voluntary or by the force or operation of law.[3] But the rent may be reserved by a special stipulation.[4] And, on the other hand, in some of the States a lease may be assigned by the lessor, so as to give the assignee the right to recover the reserved rent in his own name, without a sale or transfer of the reversionary interest.[5] But at common law such an instrument was not assignable; and in many of the States, a transfer of this character passes only an equitable title to the assignee, which cannot be recognized by and enforced in a court of law.[6]

the estate *cum onere*." Calvert v. Bradley, 16 How. 593; Stelle v. Carroll, 12 Pet. 201; Van Ness v. Hyatt, 13 Pet. 294.

[1] 1 Washb. on Real Prop., 4th ed., 509; Kimball v. Lockwood, 6 R. I. 138.

[2] Taylor's Landl. & Ten., 7th ed., § 426; Kornegay v. Collier, 65 N. C. 69; Dixon v. Niccolls, 39 Ill. 384.

[3] Kornegay v. Collier, 65 N. C. 69; Bullard v. Johnson, *Id.* 436; Rogers v. McKenzie, *Id.* 218; Franklin v. Palmer, 50 Ill. 202.

[4] Crosby v. Loop, 13 Ill. 625; Dixon v. Niccols, 39 Ill. 372; Watson v. Hunkins, 13 Iowa, 547; Leonard v. Burgess, 16 Wis. 41. But see, *contra*, Newbold v. Comfort, 2 Clark (Pa.), 331. *Quære*, Whether, if the assignment of the lease occurs before the making of a mortgage on the premises by the lessor, the general principle would apply, there being no reservation of the rent in the mortgage and no notice of the lease to the mortgagee. Kimball v. Pike, 18 N. H. 419.

[5] Watson v. Hunkins, 13 Iowa, 547; Demarest v. Willard, 8 Cowen, 206; Mussey v. Holt, 24 N. H. 248; Willard v. Tillman, 2 Hill, 274; Pfaff v. Golden, 126 Mass. 402. The court in this latter case follow the rule laid down in Demarest v. Willard, 8 Cowen, 206, stating, however, that they can see "no principle upon which the assignee of the rent, without the reversion, can sue in his own name. There is no privity of estate, and * * * no privity of contract between him and the lessee. Still, it seems to be settled that such assignee may sue in his own name for rent accruing after the assignment."

[6] Chapman v. McGrew, 20 Ill. 101; Allen v. Wooley, 1 Blackf. 148; Hopkins v. Organ, 15 Ind. 188; Dixon v. Buell, 21 Ill. 203.

§ 371. **An Assignment is either in Fact or in Law.**— The former embraces all transfers made by the voluntary act of the parties; the latter, those cases in which the estate, upon some particular event, is transferred by mere operation of law.[1]

§ 372. **Assignments in Law.**—At common law marriage was an assignment in law to the husband of the wife's chattels real; and he might sell or mortgage the same without her concurrence, and they were also liable to be taken in execution to satisfy his debts.[2] But if the wife survived the husband, an assignment, made by him in order to bind her, must have been made upon a valuable consideration.[3] And if he made no disposition of her terms for years during his life-time, he could not devise them by his will, since, after his death, the wife took the same in her own right; and yet, if he survived his wife, he took them all by survivorship.[4] The common law, however, has been modified by a great variety of statutory enactments in the different States, which space forbids our mentioning further than to refer the reader to the local statutes for the law of any State upon the subject.

A sale of a term of years under execution also takes effect as an assignment in law; the purchaser becomes an assignee, and as such is liable upon the covenants contained in the lease, while the lessee continues liable on his contract, notwithstanding his lease may have been taken from him without his consent.[5] A devisee is also an assignee, and liable upon all covenants that run with the land.[6] So, when a man dies possessed of a term of years, unless he has disposed of it by will, the law vests it in his personal repre-

[1] Taylor's Landl. & Ten., 7th ed., § 427.

[2] Co. Litt. 46, *b*; *Id.* 351, *a*.

[3] A mere voluntary assignment would not bind her. Schuyler v. Hoyle, 5 Johns. Ch. 196.

[4] Co. Litt. 351, *b*.

[5] Auriol v. Mills, 4 Term. R. 98; McNeil v. Ames, 120 Mass. 481; Lancashire v. Mason, 75 N. C. 455.

[6] Holford v. Hatch, 1 Doug. 183.

sentatives. An executor or administrator takes as assignee, by virtue of his office, without being named in the lease.[1] The term passes to the administrator for the benefit of the estate, and he cannot surrender it, and take a new lease to himself.[2]

§ 373. **An Assignment in Fact** of a leasehold interest and rights, arising under a written lease, is required by the Statute of Frauds to be by deed or note in writing, signed by the party or his agent thereto lawfully authorized in writing.[3] And in some of the States, an assignment of a lease which is under seal, to be effectual must also be under seal.[4] But in others it is not necessary that the assignment be under seal, although the lease to be transferred is a sealed instrument.[5] It has been held that an assignment in blank, made by one who affixes his seal on the back of his lease, and which is afterwards filled up by a third person, is neither a deed nor a note in writing within the statute, and is wholly void.[6] But no particular mode of expression is necessary to make an assignment, provided the intention of the parties sufficiently appears. The usual and proper words are, "grant," "assign" and "set over." No consideration need be expressed in the assignment, as the liability assumed by the assignee is a sufficient consideration.[7]

[1] Shep. Touch. 468; Gutzweiler's Admr. v. Lackmann, 39 Mo. 91.

[2] Keating v. Condon, 68 Pa. St. 75.

[3] Bedford v. Terhune, 30 N. Y. 459. But see Waller v. Thomas, 42 How. Pr. 337, where members of an association were held liable as assignees from the association, they having entered upon and used the premises and made payments to the landlord.

[4] Brewer v. Dyer, 7 Cush. 338; Bridgham v. Tileston, 5 Allen, 371; Wood v. Partridge, 11 Mass. 491. See Mayhew v. Hardesty, 8 Md. 479. Where the assignee of a lease under seal assigns it by a writing not under seal, and not recorded, but continues to collect the rents from the subtenants, and his assignee does not enter, the original assignee remains liable for rent. Sanders v. Partridge, 108 Mass. 556.

[5] Holliday v. Marshall, 7 Johns. 211; Hess v. Fox, 10 Wend. 436; Botting v. Martin, 1 Campb. 318; Esty v. Baker, 48 Me. 495. In Ohio, before the Act of 1824, an assignment of a lease attested by one witness was good. Bisbee v. Hall, 3 Ohio, 449.

[6] Jackson v. Titus, 2 Johns. 430.
Barker v. Keate, 1 Mod. 263.

It may be added that, to vest title in the assignee, there must be an absolute delivery of the assignment; and if it be delivered to a third person, to be delivered to the assignee on payment of the purchase-money, no title passes by a delivery without payment.[1]

§ 374. **The Proper Covenants to be Inserted in the Assignment of a Lease,** are stated by Mr. Taylor to be: "on the part of the assignor, that the indenture of the lease is good in law; that he has power to assign;[2] that he will save the assignee harmless from former grants and incumbrances, and for quiet enjoyment.[3] On the part of an assignee, they are, that he will pay rent, and perform the services and covenants mentioned in the lease, or save the assignor harmless therefrom."[4] Though any stipulations or agreements between the parties, which are pertinent to the subject, may be introduced into the assignment by way of covenants; provided, of course, that the assignment is by deed.

§ 375. **The Effect of an Assignment of Lease.**—A lessee, while he continues to occupy the premises, holds both by privity of estate and of contract. By privity of estate is meant identity of title, or the relation which subsists between parties holding under the same title, the one subordinate to the other. Privity of contract is the relation which subsists between two contracting parties. By an assignment the lessee divests himself of his privity of estate, which passes with the estate to the assignee, who then holds in privity of estate with the original landlord. But though a lessee may thus destroy his privity of estate, the privity of contract still remains, the effect of which is, that an assignment, made with the assent of the lessor, discharges the obligations of the lessee arising from privity of estate, but not those arising from privity of contract, such

[1] Peabody v. Fenton, 3 Barb. Ch. 451.

[2] This has been held to be implied. Bensel v. Gray, 6 N. Y. Superior Ct. 147.

[3] But see Knickerbacker v. Killmore, 9 Johns. 106.

[4] Taylor's Landl. & Ten., 7th ed., § 431.

as the express stipulations of a lease.[1] It is a general rule that a termor cannot transfer the privity of estate between himself and his landlord without the latter's consent; and therefore a lessee cannot discharge himself from implied covenants without such assent; but an assent may be inferred from the lessor's receiving rent from the assignee, or otherwise recognizing him as his tenant. Thus, it has been held that an action of debt for rent will not lie against a lessee who has assigned his term, after acceptance of rent from the assignee.[2] But a tenant is bound by his express covenant to pay rent, though he has assigned the lease with his landlord's assent, and the assignee is accepted as tenant and rent received from him, unless the landlord has accepted the surrender of the former and released him.[3]

§ 376. **Continued.—Rights and Liabilities of an Assignee.**—An assignee takes all the interest of the lessee in the premises, whether it be in possession or expectancy.[4]

[1] Ghegan v. Young, 23 Pa. St. 18; Gordon v. George, 12 Ind. 408; Harmony Lodge v. White, 30 Ohio St. 569; Greenleaf v. Allen, 127 Mass. 248; Salisbury v. Sehuley, 66 Cal. 223; Wilson v. Gerhardt (Col.), 13 Pac. Rep. 705; Oswald v. Fratenburgh (Minn.), 31 N. W. Rep. 173.

[2] Fletcher v. McFarlane, 12 Mass. 43; Stimmel v. Waters, 2 Bush. 282; Carter v. Hammett, 18 Barb. 608; Harmony Lodge v. White, 30 Ohio St. 569.

[3] Frank v. Maguire, 42 Pa. St. 77; Wall v. Hinds, 4 Gray, 256; Walton v. Cronly, 14 Wend. 63; Garner v. Byard, 23 Ga. 289; Bailey v. Wells, 8 Wis. 141; Barhydt v. Burgess, 46 Iowa, 476; Pfaff v. Golden, 126 Mass. 402; Hunt v. Gardner, 39 N. J. L. 531; Taylor v. DeBus, 31 Ohio St. 468. Where a tenant, under a lease containing no restrictions upon subletting, sublets a portion of the premises, and subsequently, without the knowledge or assent of the subtenant, surrenders his term to the owners, such surrender and the consequent merger of the greater and lesser interest, terminate the original lease and the term created thereby as between the parties to the lease and the surrender. But the interests and the terms of the sub-tenant continue as if no surrender had been made. The surrenderees and owners in fee become his immediate landlords, with only such rights as his lessor would have had to the possession of the premises before the expiration of the term. Eten v. Luyster, 60 N. Y. 252; Krider v. Ramsay, 79 N. C. 354.

[4] Potts v. Delaware Water Power Co., 9 N. J. Eq. 592. An assignment conveys the tenant's right to compensation for new erections on the land, covenanted by the lease to be paid for by the lessor. Hunt v. Dan

but he takes it subject to all the equities with which it is charged in the hands of the original party, and must, therefore, perform all covenants which are annexed to the estate, so long as he is in possession.[1] Thus, where a lease containing a covenant for the payment by the lessee of the taxes assessed upon the demised premises, is assigned without any covenant on the subject, the assignee is liable to his assignor for the taxes accruing during his term which the lessee has been obliged to pay to the lessor.[2] But he is not so liable for taxes accruing after he has parted with his possession by assignment to another.[3] An assignee is chargeable, as we have seen, by privity of estate only upon covenants running with the land, and not upon mere collateral obligations.[4] The question as to what covenants run with the land, and in what assigns must be named in order to be bound, has been discussed in the previous chapter, and need not be reverted to here.[5] It may be observed that an actual entry upon the demised premises by an assignee is not requisite, in order to charge him with the performance of covenants running with the land. The acceptance of a conveyance of the estate binds him the same as if he had taken actual possession.[6] As an assignee is bound by covenants real annexed to the estate, he is also entitled to the advantage of any such covenants; except where a breach has hap-

forth, 2 Curtis, 592. Where the covenants did not run at law, because assigns were not named therein: *held*, that the assignee could sue thereon in the assignor's name. Thompson v. Rose, 8 Cow. 266.

[1] Van Schaick v. Third Ave. R. R., 49 Barb. 409; Doty v. Burdick, 83 Ill. 473. But the assignees of a lease are not liable to the lessor for rent accruing to him under a parol promise from the assignor. Coit v. Braunsdorf, 2 Sweeney (N. Y.), 74. Covenants in the orignal lease are binding upon an assignee of the lease, but not upon a subtenant of the lessee. Harvey v. McGrew, 44 Tex. 412.

[2] Patten v. Deshon, 1 Gray, 325; State v. Martin, 14 Lea (Tenn.), 92; Burnett v. Lynch, 5 B. & C. 589.

[3] Mason v. Smith, 131 Mass. 510.

[4] *Ante*, § 347; Norman v. Wells, 17 Wend. 136; Co. Litt. 215 *b*.

[5] See *Ante*, § 348.

[6] Babcock v. Scoville, 56 Ill. 461; Trabue v. McAdams, 8 Bush (Ky.), 74. But see Knox v. Bailey, 4 Mo. App. 581, denying Demainville v. Wann, 32 N. Y. 197. And see Simonds v. Turner, 120 Mass. 328.

pened before his own time, in which case the right to sue for the breach becomes a mere chose in action, and is not assignable.[1] And since the only ground upon which he is liable is the privity of estate, he may always discharge himself from liability for subsequent breaches in respect to rent or other covenants by assigning over; even though it be done for that purpose and made to an irresponsible party.[2]

§ 377. **Of an Assignee of the Reversion.**—At common law, the assignee of the reversion could neither sue nor be sued upon the covenants contained in a lease, for the reason that he was considered a stranger to them,[3] it being a well settled rule of law that no person can take advantage of a covenant or condition, unless he be a party or privy to it. But by the statute of 32 Hen. VIII., ch. 34, the privity of contract, together with the privity of estate, was transferred to the assignee of the reversion, which enabled him to take advantage of the conditions and covenants annexed to the estate, and gave the tenant a like remedy against an assignee that he would have against the assignor.[4] And this statute is believed to be in force in most of the States.[5] As also that of 4 Anne, ch. 16, § 9, by

[1] Martin v. Baker, 5 Blackf. 232. The arrears of rent due on a lease pass by a transfer (whether a technical assignment or sublease is not important) which purports to transfer all the assignor's "right, title and interest" in the lease, with the purpose to put the assignee in his place and stead, so far as concerns his rights under the lease. United States v. Hickey, 17 Wall. 9.

[2] Armstrong v. Wheeler, 9 Cow. 88; Co. Litt. 3 *a*. And even though the assignee may receive from the assignor a premium, as an inducement to accept the transfer. Johnson v. Sherman, 15 Cal. 287.

[3] Co. Litt. 215, *a*.

[4] The provisions of this statute do not extend to the collateral covenants, but only to covenants touching or concerning the thing demised. Norman v. Wells, 17 Wend. 136.

[5] Mussey v. Holt, 24 N. H. 248; Funk v. Kincaid, 5 Md. 404; English v. Key, 39 Ala. 113; Patten v. Deshon, 1 Gray, 325; Norman v. Wells, 17 Wend. 136; Haywood v. O'Brien, 52 Iowa, 537. A lessor may convey the reversion with the rent, or retaining the reversion, may assign the rent, and in either case the grantee or assignee may sue for the rent. Perrin v. Lepper, 34 Mich. 292; Beal v. Boston Car Spring Co., 125 Mass. 157. Where a lessor grants part of the reversion the rent is apportiona-

which the necessity of a formal attornment,[1] in order to complete a grant of the reversion, was finally abolished, so that an assignment by the landlord is now valid without that ceremony.[2] But the assignee must give notice of the transfer to the tenant, before he can sue for rent accruing after the assignment. Though after an attornment, or its equivalent notice, the assignee will be entitled to all arrears of rent that accrue subsequent to the conveyance;[3] but the payment of rent to the grantor, before notice of the grant, is binding upon the grantee; nor will the tenant be liable to the grantee for any breach of condition in the lease, until after he has received notice of the grant.[4] A purchaser of demised premises is bound to take notice of the rights of the lessee; and will be bound by the covenants in the lease, if he acquires title while the lessee is in possession, or with notice of his rights.[5] The Supreme Court of Connecticut has lately held that where a grant of the reversion of an estate expectant on the determination of a lease for years is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage, and in

ble and the lessor may sue in covenant for the whole rent and recover the part to which he is entitled. Worthington v. Cooke, 56 Md. 51.

[1] An attornment is the acknowledgment by the tenant of a new landlord, after a transfer of the premises, and his agreement to become tenant to the purchaser. Lindley v. Dakin, 13 Ind. 388. And is not the creation or initiation of a new lease. Tilford v. Fleming, 64 Pa. St. 300.

[2] Burden v. Thayer, 3 Mete. 76; Farley v. Thompson, 15 Mass. 18; Coker v. Pearsall, 6 Ala. 542; Baldwin v. Walker, 21 Conn. 168; Perrin v. Lepper, 34 Mich. 292; Stimson's Amer. Stat., § 2009.

[3] Breeding's Heirs v. Taylor's Heirs, 13 Ky. 481. An attornment to a stranger or to the claimant of an adverse title is void. Jackson v. Delaney, 13 Johns. 537; Jackson v. Harper, 5 Wend. 246; Lawrence v. Brown, 5 N. Y. 394; Kornegay v. Collier, 65 N. C. 69; Bullard v. Johnson, *Id.* 436.

[4] Co. Litt. 215, *b*; Farley v. Thompson, 15 Mass. 26.

[5] Bailie v. Rodway, 27 Wis. 172.

arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor.[1]

ARTICLE III.

MODES OF DETERMINING LEASES.

SECTION.

379. The subjects embraced under the present head.
380. Lapse of time.
381. The happening of a specified event.
382. Forfeiture for breach of condition.
383. Merger.
384. Surrender defined.
385. Surrender may be in express words or by operation of law.
386. Of an express surrender.
387. Surrender by operation of law.
388. Tenant's disclaimer.
389. Failure of the lessor's title.
390. By force of some statute or the policy of the law.

§ 379. **The Subjects Embraced under the Present Title.** —Having considered the methods of making, executing and transferring leases, it only remains for us to notice the several modes by which they may be determined. The same reasons that led us to omit any consideration of the manner of creating a tenancy at will and its kindred estates, will be a sufficient excuse for our omission to notice the method of determining such tenancies,[2] which ordinarily comes under the head of "notice to quit."[3] Those to be considered in the present article are properly embraced under the following general heads: Lapse of time, or the happening of the event upon which the estate is limited; forfeiture for breach of condition; merger or

[1] King v. Housatonic R. R. Co., 45 Conn. 226.
[2] *Ante*, § 162.
[3] See Taylor's Landl. & Ten., 7th ed., §§ 446, 487.

surrender of the lease; disclaimer by the tenant; failure of the lessor's title; the termination of the lessee's interest in the premises by force of some statute. Some of these we shall find it convenient to subdivide into other more particular heads.

§ 380. **Lapse of Time.**—A lease for a definite term of years will, of course, expire with the term, at the end of the time limited. The rule in respect to the computation of time, generaly laid down, is that the first and last day of the time shall not both be counted; but that one terminus shall be excluded and the other included, according to circumstances or the apparent intention of the parties.[1] If a lease be made for a month or months, in this country, calendar months are usually intended.[2] But by the English law, a month means a lunar month of twenty-eight days.[3]

§ 381. **The Happening of a Specified Event.**—A term may also be demised subject to a contingent earlier determination of it by a collateral event, as by death of either of the parties, or by the lessor's selling the property, or by any similar condition, the happening of which will *ipso facto* determine the lease.[4] So, upon a lease for life.[5] No man can grant a lease to continue beyond the period at which his own estate is to determine; and therefore a tenant for life cannot make a lease to continue after his death.[6] But

[1] Sheets v. Selden's Lessee, 2 Wall. 190; Farwell v. Rogers, 4 Cush. 460; Small v. Edrick, 5 Wend. 137; Wiggin v. Peters, 1 Metc. 127; Judd v. Fulton, 10 Barb. 117; People v. Robertson, 39 Barb. 9. The day is included when its exclusion would produce a forfeiture or estoppel. Windsor v. China, 4 Me. 298; Sims v. Hampton, 1 Serg. & R. 411. Local custom will sometimes control. Fox v. Nathans, 32 Conn. 348; Wilcox v. Wood, 9 Wend. 346; Marys v. Anderson, 24 Pa. St. 272.

[2] Sheets v. Selden's Lessee, 2 Wall. 177; Gross v. Fowler, 21 Cal. 392; Strong v. Birchard, 5 Conn. 361; Avery v. Pixley, 4 Mass. 460.

[3] 2 Bl. Com. 141. A distinction has been held between "twelve months" and "a twelve month," and the latter held to mean a year. Catesby's Case, 6 Coke, 51.

[4] Knowles v. Hull, 97 Mass. 206; Ashley v. Warner, 11 Gray, 43; Munigle v. Boston, 3 Allen, 230; Shep. Touch. 274; Antoni v. Belknap, 102 Mass. 193; Flagg v. Badger, 58 Me. 258.

[5] Shep. Touch. 187.

[6] Robie v. Smith, 21 Me. 114; 4 Kent's Com. 106.

a lease made under a power may continue, notwithstanding the determination of the estate, by the death of the person by whom the power is to be exercised.[1] As the doctrine of powers came from equity,[2] the intention of the party who gave the power will govern its construction; and the execution of it will be subject to the general supervision of a court of equity.[3]

§ 382. **Forfeiture for Breach of Condition.**—We have seen that a tenant may forfeit his lease in consequence of the breach of a condition therein contained, which authorizes the landlord to re-enter and thus put an end to the tenancy.[4] But such stipulations are strictly construed, and, in order to enforce them, there must be such a breach shown as it was the clear and manifest intention of the parties to provide for.[5] A forfeiture of a lease for breach of contract must be enforced promptly, and slight circumstances will be treated as a waiver of the right.[6] It is optional with the lessor, whether he will avail himself of the right to re-enter for the breach of a condition or not;[7] and unless he does so, or signifies his in-

[1] Co. Litt. 219; 4 Kent's Com. 106.

[2] The doctrine was introduced into the common law by the Statute of Uses. Ch. II, Art. XI.

[3] A trustee, holding a fee determinable when the purpose of the trust shall cease, has power to lease for a term, which may extend beyond the period of his trust estate, subject to the jurisdiction of a court of equity to annul the lease, if unreasonable or improvident. Greason v. Keteltas, 17 N. Y. 491.

[4] *Ante*, §§ 333, 341; Johns v. Whitley, 3 Wils. 65; Doe v. Phillips, 2 Bing. 13; Davis v. Moss, 38 Pa. St. 346; Wheeler v. Earle, 5 Cush. 31.

[5] Brown's Admr. v. Bragg, 22 Ind. 122; Baxter v. Lansing, 7 Paige, 350; Kentucky River Co. v. Commonwealth, 13 Bush, 435; Smith v. Blaisdell, 17 Vt. 199; Spear v. Fuller, 8 N. H. 174. Miller v. Havens, 51 Mich. 482. The right of a landlord to re-enter for breach of a condition subsequent is not viewed with favor in the law; and where he claims a forfeiture, he must show that he has done everything required on his part to perfect such right of re-entry. Meni v. Rathbone, 21 Ind. 454. For breach of a mere covenant, the landlord has no right of re-entry, unless there is an express clause in the lease which authorizes it. Johnson v. Gurley, 52 Tex. 222; Vanatta v. Brewer, 32 N. J. Eq. 268.

[6] Allen v. Dent, 4 Lea (Tenn.), 676; Johnson v. Doylas, 73 Mo. 168.

[7] Even though the lease, by its terms, is to cease or become void for

tention to treat the lease as void, if it so provides,[1] the estate will continue.[2] The effect of the condition is to render the lease voidable only; and it may be affirmed by the acceptance of rent, or any act which shows an intention on the part of the lessor that the term shall continue.[3] But to have the effect of a waiver, the landlord must accept rent which accrued after the forfeiture happened,[4] and with knowledge of the fact that the condition has been broken.[5] Where there is a continuing cause of forfeiture, such as using the premises in a manner prohibited by the lease, and

the non-performance of its covenants. Dermott v. Wallach, 1 Wall. 64; Shumway v. Collins, 6 Gray, 231; Ludlow v. New York & Hudson R. R., 12 Barb. 440. See *ante*, § 339. But see Davis v. Moss, 38 Pa. St. 352; Beach v. Nixon, 9 N. Y. 35.

[1] *Ante*, § 339. Where the proviso is that the lease shall become void upon a certain event, and this condition is intended for the benefit of the lessor, it makes the lease void at his option only, and when he actually avails himself of his privilege. Doe v. Bancks, 4 Barn. & Ald. 401; Roberts v. Davey, 4 Barn. & Ald. 664. Where the proviso is that the lease shall be void and the lessor re-enter, it is only voidable by re-entry. Garnhart v. Finney, 40 Mo. 460.

[2] Blyth v. Dennet, 13 C. B. 178, 180; Woodfall's Landl. & Ten., 9th ed., 286, 664.

[3] Jackson v. Andrew, 18 Johns. 431; Duppa v. Mayo, 1 Saund. 287, *b*; Chalker v. Chalker, 1 Conn. 79; Porter v. Merrill, 124 Mass. 534. If the landlord, after forfeiture has been incurred, proceeds to make a distress for rent, he thereby affirms the possession of the tenant, although the rent may have previously become due, because he cannot distrain for rent, unless the relation of landlord and tenant, and consequently the lease itself continues to exist. Jackson v. Allen, 3 Cow. 220; Stuyvesant v. Davis, 9 Paige, 427.

[4] Jackson v. Allen, 3 Cow. 220; Bleecker v. Smith, 13 Wend. 530; Mattice v. Lord, 30 Barb. 382; Stuyvesant v. Davis, 9 Paige, 427. See Bowman v. Foot, 29 Conn. 331; Conger v. Duryee, 90 N. Y. 594. But this does not prevent the lessor from treating a subsequent breach as a ground of forfeiture. O'Keefe v. Kennedy, 3 Cush. 325; Murray v. Harway, 56 N. Y. 343; Ireland v. Nichols, 46 N. Y. 413.

[5] Jackson v. Schultz, 18 Johns. 174; Garnhart v. Finney, 40 Mo. 449. Where a lease contains a covenant on the part of the lessee not to assign, with a forfeiture of the lease in case of breach, acceptance of rent by the lessor, accruing after an assignment, with knowledge thereof, is a waiver of the forfeiture, and the condition dispensed with is dispensed with forever. Murray v. Harway, 56 N. Y. 337; Heeter v. Eckstein, 50 How. Pr. 445.

the like,[1] the lessor will not be precluded from taking advantage of it by receiving rent which accrued after the original breach, provided the user continues after such receipt. The receipt of rent is only a waiver of that portion of the breach which has accrued at the time the rent is received; and if the breach continues, it will work a new forfeiture.[2] The distinction is, that a condition which imposes a single obligation,[3] as a condition against assigning, is wholly discharged by one waiver; but the waiver of a condition that is continuous, only discharges the particular breach.

We have noticed in a former chapter what demand is necessary in order to authorize the landlord to enter for non-payment of rent.[4] It was also observed that conditions are indivisible, and therefore if a lessee or any assignee of a portion of the premises commits any act which by the terms of the lease creates a forfeiture, such forfeiture attaches to the whole premises embraced in the lease.[5] It only remains to be noticed in what cases equity will interfere to grant relief against the consequences of a forfeiture occasioned by the non-performance of a covenant contained in the lease. Upon this question the authorities are not altogether in harmony. It was held in a case in New Jersey, that where a landlord, by his acquiescence in the tenant's dilatoriness in the payment of rent, has induced the tenant to believe that strict observance of his covenant to pay the rent at the times specified in the lease will not

[1] Stuyvesant v. Mayor, etc. of New York, 11 Paige, 427. A covenant to build within a given time on the demised premises, is not a continuing covenant, and if the lessee fails to build, the receipt of rent by the lessor, accruing after the end of the time given, is a waiver of the forfeiture. McGlynn v. Moore, 25 Cal. 385.

[2] Doe v. Bliss, 4 Taunt. 735; Ireland v. Nichols, 46 N. Y. 413.

[3] 1 Smith's Lead. Cas., 7th Am. ed., 104; Murray v. Harway, 56 N. Y. 337.

[4] *Ante*, § 336. And see Gage v. Bates, 40 Cal. 384; Bowyer v. Seymour, 13 W. Va. 12.

[5] *Ante*, § 339; Clarke v. Cummings, 5 Barb. 339; Jackson v. Brownson, 7 Johns. 227. And see Bacon v. Western Furniture Co., 53 Ind. 229.

be required, equity will not permit the landlord to enforce a forfeiture, where under the circumstances it would be inequitable, and full compensation can be made to the landlord for the tenant's default.[1] The prevailing doctrine seems to be that a court of equity will grant relief from a forfeiture for non-payment of rent or taxes according to covenant, whenever the liability for breach of the condition may be compensated in damages.[2]

§ 383. **Merger** is the act of law, by which the lesser of two estates is extinguished, by their uniting in the same person in the same right, without any intermediate estate. The estate in which the merger takes place is not enlarged by the accession of the preceding estate; but the greater or only subsisting estate continues after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser is extinguished. Merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person.[3] For example, if there be a tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheretance and no longer exists.[4] Or where a term of years meets another term immediately expectant thereon, the elder term merges in the term in reversion or remainder.[5] The wisdom of the doctrine of merger is apparent from the manifest inconsistency there would be in allowing a person to have two distinct estates, immediately expectant on each other, while one of

[1] Thropp v. Field, 26 N. J. Eq. 82.

[2] Sheets v. Selden, 7 Wall. 416; Giles v. Austin, 62 N. Y. 486; Chadwick v. Parker, 44 Ill. 330; Lilley v. Fifty Associates, 101 Mass. 435. But see People's Bank v. Mitchell, 73 N. Y. 406. And see Horton v. N. Y. Cent. etc. R. R. Co., 12 Abb. N. Cas. 30.

[3] 4 Kent's Com. 99.

[4] 2 Bl. Com. 177. Where a lessee after subletting assigns to the lessor who receives from the lessee the rent reserved, there is no merger. Bailey v. Richards, 66 Cal. 416; Hamilton v. Reed, 13 Daly (N. Y.), 436.

[5] 4 Kent's Com. 99.

them includes the time of both, thus uniting the two different characters of landlord and tenant in the same person. There is no incompability, and, therefore, there is no merger, where the two estates are successive and not concurrent. Another essential to a merger is that there must be two or more estates. Unless there be at least two estates, there is no occasion for a merger, A mere right or title will not suffice.[1] It seems to be requisite also, that one of the estates be of higher degree, or superior to the other; for, as a general rule, equal estates will not merge.[2] An estate for years may merge in an estate in fee, or for life;[3] or an estate for the life of another may merge in an estate for one's own life; or the term of an under-tenant may merge in the term in remainder or reversion. The next requisite is that the several estates must meet and vest in the same person and in the same right. Several estates in distinct persons will continue, of course, several and distinct interests; and the same effect will follow, if the several estates be held by the same person in different rights. The examples given by Blackstone are: "If the freehold be in his own right, and he has term in right of another, there is no merger. Therefore, if a tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife."[4] But it seems that no person can have a term of years in his own right and freehold in another right; for in that case his own term will merge in the free-

[1] 3 Prest. Conv. 404.

[2] 4 Kent's Com. 99.

[3] Although the term be for a thousand years; for in legal contemplation an estate of freehold is of higher degree than any chattel interest. 3 Prest. Conv. 176.

[4] 2 Bl. Com. 177; Co. Litt. 388; Plowd. 418; James v. Morey, 2 Cow. 246.

hold.[1] Therefore, if the tenant marries the lessor; or if one purchases the term, while he hold the fee as executor, the term will be merged.[2]

The distinction is noted by Mr. Preston, that although there will be no merger where either of the two estates, which are held in different rights, is an accession to the other merely by the act of law, as by marriage, descent, executorship, or intestacy; yet the lesser estate will merge, as often as one of them is an accession to the other by the act of the party, as by purchase or the like.[3]

It may be added that the law will not, in general, allow merger to take place to the prejudice of creditors, legatees, infants, husbands or wives. And although it is adopted in equity for the advancement of the ends of justice, its rules will not be observed where the intentions of the parties were manifestly otherwise, or where there are beneficial interests to be protected.[4]

§ 384. **Surrender Defined.**—Surrender is a yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement.[5] It bears a near resemblance, in circumstances and effect, to merger; but the analogy does not hold in all cases. To a surrender, it is requisite that the tenant of the particular estate should relinquish his estate in favor of the tenant of the next vested estate, in reversion or remainder. But merger, as we have seen, is confined to the cases in which the tenant of the estate in reversion or remainder grants that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to him in reversion or remainder.[6] Again, as noted by Chancellor Kent, surrender is the act of

[1] Co. Litt. 388, *b*.

[2] Lea's Case, 3 Leon. 110.

[3] 3 Prest. Conv. 310.

[4] Clift v. White, 12 N. Y. 519. See Gibson v. Crehore, 3 Pick. 475; Gardner v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 Johns. Ch. 393.

[5] Co. Litt. 337, *b*.

[6] Prest. Conv. 25; 4 Kent's Com. 100.

the party, and merger is the act of the law.[1] It may be remarked also, that a surrender is of a nature directly opposite to a release; while the latter operates by the greater estate descending upon the less, the former is the falling of a lesser estate into a greater by deed. A surrender immediately divests the estate of the surrenderer, and vests it in the surrenderee, even without the assent of the latter. Such assent will be presumed.[2] There can be no surrender except by a party in possession; and the person to whom the surrender is made must, as in merger, have a higher estate immediately in reversion or remainder. Thus, a tenant for life cannot surrender to him in remainder for years, nor one joint tenant to another.[3] Neither can the under-lessee surrender to the original lessor, but he must surrender to his immediate lessor or his assignee.[4] The doctrine of surrender cannot apply on a lease in fee, for the reason that there is no reversion.[5]

§ 385. **Surrender may be either in Express Words or by Operation of Law.**—Surrender is either in express words by which the lessee manifest his intention of yielding up his interest in the premises to the lessor, or by operation of law, which takes place when the parties, without any express surrender, do some act which implies that they have both agreed to consider the surrender as made.[6]

§ 386. **An Express Surrender** is required by the Statute of Frauds to be in writing. Therefore, a mere parol agreement betwen the parties, to determine a tenancy, is not

[1] *Ibid.*

[2] Shep. Touch. 300, 301. A surrender to an infant is good, for his assent will be presumed till a disagreement appears. Thompson v. Leach, 2 Vent. 198, 208.

[3] Shep. Touch. 303; Taylor's Landl. & Ten., 7th ed., § 508.

[4] 2 Prest. Abst. Tit. 7.

[5] Springstein v. Schermerhorn, 12 Johns. 357.

[6] Beall v. White, 94 U. S. 382; Lawrence v. Brown, 5 N. Y. 394; Murray v. Shave, 2 Duer, 182; 4 Kent's Com. 103; Taylor's Landl. & Ten., 7th ed., § 507. The latter is when an estate, incompatible with the existing estate, is accepted. Pierce v. Brown, 24 Vt. 165.

binding upon either.[1] Nor can a lease for years be surrendered by merely canceling the indenture without writing.[2] But a parol agreement, accompanied by acts indicating an intention to terminate the tenancy, may amount to a surrender by operation of law.[3] So the fact of cancellation may be strong corroborating evidence in aid of other proof, such as the granting of a new lease to other parties, that a surrender in law has taken place.[4]

A deed is not necessary to effect a surrender, since it may be by note in writing. Nor are any technical words necessary. The usual and proper words are "surrender" and "yield up;" but any form of words, by which the intention of the parties is sufficiently manifested, will operate as a surrender. Thus, where the lessee leased the demised premises to the lessor, the owner of the immediate reversion in fee, by an instrument like that by which he became lessee, it was held to be a surrender of the lease.[5] And where the lessee has assigned his lease to another, for his entire term, in writing, and the original lessor has orally assented to the same, and has accepted rent from the assignee, it has been held to operate as a surrender of the original lease, and a substitution of a new tenancy.[6] It is

[1] Thomson v. Wilson, 2 Stark. 379; Bailey v. Wells, 8 Wis. 141. A lease, not exceeding the term for which a parol lease would be binding, may be surrendered by parol. Kiester v. Miller, 25 Pa. St. 481; McKinney v. Reader, 7 Watts, 123. But where the unexpired term of a lease does not exceed one year, it may be surrendered by parol, although the lease was originally for a longer period. Smith v. Devlin, 23 N. Y. 363.

[2] Rowan v. Lytle, 11 Wend. 616; Raynor v. Wilson, 6 Hill, 469; *ante*, § 20.

[3] *Infra*, § 387; Hanham v. Sherman, 114 Mass. 19.

[4] Holbrook v. Tirrell, 9 Pick. 105; Baker v. Pratt, 15 Ill. 568; Walker v. Richardson, 2 Mees. & W. 882. And see *infra*, § 387.

[5] Shepard v. Spaulding, 4 Metc. 416; Challoner v. Davis, 1 Ld. Raym. 400. But where the first lease was from two, and the lease back again to one only, it did not amount to a surrender. Sperry v. Sperry, 8 N. H. 477. Nor can one of several lessees affect the rights of his co-lessees by conveying to his lessor. Baker v. Pratt, 15 Ill. 568.

[6] Logan v. Anderson, 2 Doug. (Mich.) 101; Bailey v. Delaplaine, 1 Sandf. 5; *infra*, § 387. But see Brewer v. Dyer, 7 Cush. 337; Whitney v. Myers, 1 Duer, 266.

not competent, of course, for the lessor and lessee to affect the rights of third parties by a formal surrender of the lease: as, for instance, those of the assignee, or of the lessee's subtenant.[1]

§ 387. **A Surrender by Operation of Law** takes place, as we have seen, when the parties, without express words indicating such intention, do some act which implies that they both agree to consider the surrender as made.[2] Questions of considerable difficulty sometimes arise, as to what will constitute such a surrender. It may be stated as a general proposition, that if the lessee of a term takes a new lease of the same premises, to take effect before the expiration of such term, this works a surrender of the first, unless there are facts clearly rebutting such inference.[3] This presumption is raised by the circumstances of the case. The two leases being incompatible, both cannot be valid at the same time; hence the acceptance of the second lease implies a surrender of the first. It follows that if the second lease be void, its acceptance will not amount to a surrender;[4] or if the acts of the parties, taken altogether, are such as to rebut the idea of a surrender, then none will be presumed.[5] It should be remembered, however, that it is not a question of intention. The surrender is not the result of intention, but takes effect where the owner of a particular estate has been a party to some act, the validity of which he is, by law, afterwards estopped from disputing,

[1] McKenzie v. Lexington, 4 Dana (Ky.), 129; Adams v. Goddard, 48 Me. 212, 215.

[2] Beall v. White, 94 U. S. 382; Harris v. Hiscock, 91 N. Y. 340.

[3] Van Rensselaer v. Penniman, 6 Wend. 569; Co. Litt. 338, *a*; Williams on Real Prop. 377; 1 Washb. on Real Prop., 4th ed., 548; Smith's Landl. & Ten., 225, 230; Livingston v. Potts, 16 Johns. 28; Abell v. Williams, 3 Daly, 17; Wilson v. Lester, 64 Barb. 431.

[4] Davison v. Stanley, 4 Burr. 2210; Smith v. Niver, 2 Barb. 180; Bedford v. Terhune, 30 N. Y. 463. Whether a sealed lease for a term can be surrendered by substituting a new parol one, depends on whether the new parol lease was binding within the Statute of Frauds. 1 Washb. on Real Prop., 4th ed., 548.

[5] Jackson v. Gardner, 8 Johns. 394; Coleman v. Maberly, 3 T. B. Mon. 220; Brewer v. Dyer, 7 Cush. 339. See Flagg v. Dow, 99 Mass. 18.

and which would not be valid if his particular estate had continued to exist.[1] "The law treats the doing of such an act as amounting to a surrender."[2] Where, before the expiration of the lease, the lessee actually surrenders possession of the premises to his lessor, who accepts the same and leases them to another, this has frequently been held to be a surrender.[3] And it seems that any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to resume possession of the demised premises, may amount to a surrender.[4] Upon principle, in order to constitute a legal surrender, the acts must amount to an actual surrender of the possession by the lessee, and an acceptance of such possession by the lessor, such as receiving the keys of the house, going into possession, accepting the tenant of the lessor as his own and receiving rent from him, or some other act of equivalent significance.[5]

[1] Lyon v. Reed, 13 Mees. & W. 306. See 1 Washb. on Real Prop., 4th ed., 552; Nelson v. Thompson, 23 Minn. 508.

[2] Lyon v. Reed, 13 Mees. & W. 306.

[3] Randall v. Rich, 11 Mass. 494; Hesseltine v. Seavey, 16 Me. 212; Dodd v. Acklom, 6 Man. & G. 673; Grimman v. Legge, 8 Barn. & C. 324; Hanham v. Sherman, 114 Mass. 19; Amory v. Kannoffsky, 117 Mass. 351.

[4] Talbott v. Whipple, 14 Allen, 180. This doctrine was applied in a case where the lessee returned the lease to the lessor's office and took a receipt thereof from a person not proved to be authorized to accept a surrender, and the lessor, without returning it, received rent from one to whom the lessee had sublet the premises. Amory v. Kannoffsky, 117 Mass. 351. The destruction of the lease by mutual consent for the purpose of making a new one. Baker v. Pratt, 15 Ill. 568.

[5] See Taylor's Landl. & Ten., §§ 512, 518; Stobie v. Dills, 62 Ill. 432; Martin v. Stearns, 52 Iowa, 345. When a landlord takes the key to the premises and deals with it as if it had become his own, the act is sufficient to authorize a jury to find that the landlord intended to resume possession and to discharge the tenant from his obligation as lessee. Dos Santos v. Hollinshead, 4 Phil. 57; Hegeman v. McArthur, 1 E. D. Smith, 147. But see, *contra*, Bloomer v. Merrill, 1 Daly, 485; *Id.*, 29 How. Pr. 259; Prentiss v. Warne, 10 Mo. 601. Retention of the keys by the lessor, after being sent to him by the lessee, of itself, is not sufficient to prove a surrender. Thomas v. Nelson, 69 N. Y. 118; Morgan v. Smith, 70 N. Y. 537. But the putting another tenant in by the lessor is sufficient. Ladd v. Smith, 6 Oreg. 316.

§ 388. **Tenant's Disclaimer.**—At common law, a tenant forfeited his lease by assuming a position hostile to his landlord, or doing any act indicating a disclaimer of his title, such as affirming, by matter of record or otherwise, the fee to be in a stranger; claiming a greater estate than he is entitled to; refusing to pay rent and attorning to a stranger; or aliening the estate in fee by any mode which had the effect of divesting the estate of the reversioner, as by feoffment or other common-law conveyance.[1] The last mentioned ground of forfeiture has no application to the conveyances in use in this country, and therefore requires no further mention.[2] Although a mere verbal disclaimer of the landlord's title by the lessee, and asserting title in himself, does not seem to have amounted to a forfeiture at common law,[3] it is now held in many of the States, that if a tenant, even by mere words, distinctly repudiates his lessor's title and asserts one in himself, and this is made known to his lessor, the tenant's holding becomes adverse, and consequently his tenancy is forfeited.[4] A lease will also be forfeited by a fraudulent attornment, as by the tenant's accepting a lease from a stranger, and on that ground refusing to pay rent,[5] but not, it seems, until the attornment

[1] Co. Litt. 251, *b*.

[2] It never applied to conveyances operative under the Statute of Uses. Jackson v. Mancius, 2 Wend. 357.

[3] De Lancey v. Ganong, 9 N. Y. 9.

[4] Willison v. Watkins, 3 Pet. 43; Thayer v. Waples, 26 La. Ann. 502; Sherman v. Champl. Tr. Co., 31 Vt. 177; Baker v. Noll, 59 Mo. 265; Doty v. Burdick, 83 Ill. 473; Stott v. Rutherford, 92 U. S. 107; Allen v. Paul, 23 Gratt. 332; Bowdish v. Dubuque, 38 Iowa, 341; Frazer v. Robinson, 42 Miss. 121; Longfellow v. Longfellow, 61 Me. 590; Hardy v. Akely, 57 Barb. 148; Brenner v. Bigelow, 8 Kan. 497; Lebanon School Dist. v. Lebanon Female Sem. (Pa.), 12 Atl. Rep. 857; Tilyon v. Reynolds (N. Y.), 15 N. E. Rep. 534; Estabrook v. Hateroth, 34 N. W. Rep. 634; Gallagher v. Connell (Neb.), 36 N. W. Rep. 566. But this rule does not hold where the tenant is induced to accept the lease or the possession by fraud or mistake. Bigler v. Furman, 58 Barb. 545; Higgins v. Turner, 61 Mo. 249; Evans v. Bidwell, 76 Pa. St. 497; Jenckes v. Cook, 9 R. I. 520; Gallagher v. Bennett, 38 Tex. 291.

[5] Thompson v. Pioche, 44 Cal. 508; Leach v. Koenig, 55 Mo. 451. And see Stagg v. Eureka Tanning Co., 56 Mo. 317; Anderson v. Smith, 63 Ill.

is made known to the lessor.[1] In short, a tenant can do no act inconsistent with, or which could change the relation between himself and his landlord, without first yielding and delivering up to the latter the possession acquired from him.[2]

§ 389. **Failure of Title—Eviction.**—It was a well settled principle of the common law that a lease for years, made by a disseizor or wrong-doer, was absolutely determined by the entry of the disseizee or rightful possessor.[3] And, as no man can grant a lease to continue beyond the period at which his own estate is to determine, it follows

126. A tenant cannot justify his attornment to a third party by merely showing that such party has recovered a judgment against him for the possession of the premises. He must show that his landlord was notified of the pendency of the action and had an opportunity to defend; otherwise the landlord is neither bound nor estopped by the judgment. Douglas v. Fulda, 45 Cal. 592. An attornment to the mortgagee, even after forfeiture by non-payment, is not valid until the mortgage is foreclosed. Mills v. Hamilton, 49 Iowa, 105. A tenant in possession under one title can make no valid attornment to any one not in privity with that title; and one in possession as tenant in common, in privity and full recognition of the title of the undivided interest not owned by himself, as belonging to some one else, is bound to account to the latter; and a promise to pay rent to another, made by such tenant in possession on the assumption that said promisee had such outstanding interest, cannot be enforced without proof that he held such title; for if he had no title, the attornment would be void and the promise without consideration. Fuller v. Sweet, 30 Mich. 237. And see Camarillo v. Fenlon, 49 Cal. 205.

[1] Doe v. Reynolds, 27 Ala. 364; Stacy v. Bostwick, 48 Vt. 192. See Russell v. Fabyan, 34 N. H. 223.

[2] Bertram v. Cook, 32 Mich. 519; Rogers v. Boyton, 57 Ala. 501; Hughes v. Watt, 28 Ark. 153; Wilson v. James, 79 N. C. 349. Neither can an assignee of the lessee. Earle v. Hale, 31 Ark. 470. But the rule does not preclude the lessee from acquiring the title of his lessor, either by a direct conveyance or by an equivalent one through the direct operation of law, as where the lessee purchases the lessor's reversion at sheriff's sale on an execution against the lessor. Nellis v. Lathrop, 22 Wend. 121; Higgins v. Turner, 61 Mo. 251. Neither does it prevent the lessee from showing that the landlord's title has terminated either by its own limitation or by his conveyance. St. John v. Quitzow, 72 Ill. 334; Lamson v. Clarkson, 113 Mass. 348; Jackson v. Rowland, 6 Wend. 670; Fuller v. Sweet, 30 Mich. 237; McGuffie v. Carter, 42 Mich. 497.

[3] Co. Litt. 147, *a*; Bac. Abr. Leases, I.

that if the estate which a lessor has at the time of making the lease is defeated, or otherwise legally determined, the lease is extinguished with it.[1] So an eviction of the tenant by title paramount, or by act of the lessor, will *ipso facto* determine the tenancy.[2] If a tenant yields the possession of the demised premises, in consequence of a judgment for the recovery of possession, to the person adjudged to be the rightful owner of the paramount title, it is an eviction which discharges him from the payment of rent.[3] So, where the landlord enters wilfully upon and expels the tenant actually or constructively from a part of the demised premises, though he continue in possession of the residue.[4] But when a lessee is evicted from a part only of the demised premises by one claiming under paramount title, he is discharged from the payment of so much of the rent only as is properly chargeable to the part of the premises from which he is evicted.[5]

[1] Burr v. Stenton, 52 Barb. 377.

[2] Wheelock v. Warschauer, 34 Cal. 265; Gore v. Stevens, 1 Dana, 201; Wood v. Partridge, 11 Mass. 488. Where the landlord erected a building in the back yard of the premises leased, the effect of which was to render unfit for use two rooms used by the tenant, and the tenant did not give his assent to the erection of the building, it was held that the latter might treat the act as an eviction, give up the premises and decline to pay rent. Royce v. Guggenheim, 106 Mass. 201.

[3] Home Ins. Co. v. Sherman, 46 N. Y. 370. But not when the tenant voluntary yields possession of part of the premises leased. Lettick v. Honnold, 63 Ill. 335.

[4] See *ante*, § 357; Johnson v. Oppenheim, 12 Abb. Pr. (N. S.) 453; *Id.* 43 How. Pr. 433; Skaggs v. Emerson, 50 Cal. 3; Lynch v. Baldwin, 69 Ill. 210; Colburn v. Morrill, 117 Mass. 262; Smith v. Stigleman, 58 Ill. 141; Hayner v. Smith, 63 Ill. 430. The act of the landlord must be something more than a mere trespass to have the effect of an eviction. It must be something of a grave and permanent character, done with the intention of depriving the tenant of the enjoyment of the premises. Whether the acts complained of amount to an eviction depends upon the circumstances and is a question in all cases for the jury. Lynch v. Baldwin, 69 Ill. 210; Morris v. Tillson, 81 Ill. 607. See Bartlett v. Farrington, 120 Mass. 284. Actual expulsion is not necessary. Montanye v. Wallahan, 84 Ill. 355. And see Burnham v. Martin, 8 Cent. L. J. 327.

[5] Tunis v. Grandy, 22 Gratt. 109; Seabrook v. Moyer, 88 Pa. St. 417.

We have seen that, as a general rule, the destruction of the premises by fire or other casualty does not terminate the tenancy, unless it is so provided in the lease.[1] But it has been held that if the thing leased is totally destroyed, as where the lease is of particular apartments in a building which is destroyed by fire, the lessee having no interest in the land, the lease will perish with the subject-matter.[2]

§ 390. **A Tenancy may also be Determined by Force of some Statute, or by the Policy of the Law,** as where the premises are used for an unlawful or immoral purpose. A lease of premises made for purposes of prostitution, or other immoral object, is against the policy of the law and absolutely void.[3] And in many, if not in all of the States, it is provided by statute that the owner or landlord of any premises used or occupied as a bawdy-house, or house of assignation for lewd persons, may take summary proceedings for the removal of the occupants; and in some of the States a penalty is provided for a failure to do so.

[1] *Ante*, §§ 353, 357.

[2] Graves v. Berdan, 26 N. Y. 498; Kerr v. Merchants Exchange, 3 Edw. Ch. (N. Y.) 315. A demise of the basement rooms of a building of several stories in height, without any stipulation by lessor or lessee for rebuilding in case of fire or other casualty, gives the lessee no interest in the land, though he pays all the rent in advance; and if the whole building is destroyed by fire, his interest in the rooms is terminated. Stockwell v. Hunter, 11 Mete. 448. And he cannot cover over the cellar and use it, though his lease has not expired by several years. Winton v. Cornish, 5 Ohio, 477. By statute in Conn., New York, Ohio and Minn., destruction of premises allows tenant to quit and surrender. Stimson's Am. Stat. § 2062.

[3] Taylor's Landl. & Ten., 7th ed., § 521; Russell v. De Grand, 15 Mass. 39; Shiffner v. Gordon, 12 East, 304. To avoid a lease under a statute making a lease void when a lessee uses the premises for the illegal sale or keeping of intoxicating liquors it must appear that the offense was committed upon the premises leased. Machias Hotel Co. v. Fisher, 56 Me. 321.

TITLE III.—Mortgages.

CHAPTER VIII. The Nature and History of Mortgages.
IX. Form and Requisites of a Mortgage.
X. Assignments—and herein of Purchasers of the Equity of Redemption.
XI. Redemption, Payment and Discharge.
XII. Of Foreclosure.

CHAPTER VIII.—Nature and History of Mortgages.

ARTICLE I. The origin and Development of the Law.
II. The nature of Mortgages in the Different States.

ARTICLE I.

THE ORIGIN AND DEVELOPMENT OF THE LAW.

SECTION.
395. Definition of a mortgage.
396. The origin of mortgages.
397. The *vivum vadium*.
398. The *mortuum vadium*.
399. Origin of the English law of mortgages.
400. A mortgage at the common law.
401. Origin and growth of the equity of redemption.
402. Two opposite sets of rules at law in and equity.
403. The doctrine reduced to a harmonious system.

§ 395. **Various Definitions of a Mortgage** have been given by different judges and law writers, none of which can be said to be absolutely correct, when applied to every species of security comprehended by the term. An ordinary mortgage may be described to be a conveyance of property by way of pledge to secure the payment of money, the fulfillment of some contract, or the performance of some act, and to become void upon such payment or performance, agreeably to the provisions of the deed.[1] "The legal ownership is vested in the mortgagee, but in equity the mortgagor remains the actual owner, until he is barred by his own default, or by judicial decree."[2] In consequence of this double nature of mortgages, arising out of the different and even conflicting views taken of the subject by the courts of law and of equity, and the confusion that it has occasioned in the doctrine as administered in the different States, no definition of the term can be comprehended in a single proposition, which will give an adequate and just conception of the law as it now exists. To do this is the service that will be attempted in the present chapter. And no more eligible way presents itself than to begin with a brief sketch of the history of the development of that law.

§ 396. **The Origin of Mortgages.**—There has been much speculation among law writers in regard to the origin of mortgages. They are supposed by some to have originated with the Jews,[3] while others have expressed the opinion that they ought rather to be attributed to the natural re-

[1] Mitchell v. Burnham, 41 Me. 299; Wing v. Cooper, 37 Vt. 179. "At common law, a mortgage is defined to be a deed conveying lands, conditioned to be void upon the payment of a sum of money, or the doing of some other act." Lund v. Lund, 1 N. H. 41. "An estate upon condition defeasible by the performance of the condition according to its legal effect." Erskine v. Townsend, 2 Mass. 495; Carter v. Taylor, 3 Head (Tenn.), 30; Briggs v. Fish, 2 D. Chip. (Vt.) 100.

[2] 4 Kent's Com. 136; Coote on Mort., p. 1.

[3] Powell on Mortgages, 1. Mr. Coote says: "In early times the Jews were the great money lenders. It was held usury for Christians to lend money at interest; and accordingly, if lands were enfeoffed to a creditor, and the rents and profits received by him, and not applied to the

quirements of civilization.[1] Certain it is that mortgages, or at least pledges of land in the nature of mortgages, were not unknown to the Anglo-Saxons in England;[2] though very little can be gathered in respect to the law governing such transactions. In the time of Glanville, mortgages had assumed two distinct forms, which he desig-

principal of the debt, although not prohibited by the King's Court, it was punishable by forfeiture of his lands and chattels, if he died possessed of the pledge. And this, according to Glanville, was the original meaning of the term *mortuum vadium*, and not the meaning subsequently attached to the word by Littleton and others." Coote on Mort. 41.

[1] "In a state of nature, agreements of this kind must have been entirely useless; for, in that state, a creditor might have seized on any part of his debtor's goods, without ceremony or contract. Puff. Lib. 5, c. 10, § 16. But when society became compact and consolidated, there immediately arose a right to every man to enjoy his own, and the support and vindication of that right was one grand object to every civilized community. Among subjects of the same State it must have soon suggested itself, that no easier mode of supplying their immediate wants could have been adopted, than by a system of resorting to a borrowing on loan. They must frequently have been in need of temporary accommodation, and the plan of assisting each other on credit would have exhibited the readiest method of giving relief to their present necessities. In case of magnitude, they would have required a pledge or security for the return of the thing borrowed; and the immediate resignation of some transportable article was the consequence of a compliance with that request. Hence it would appear that the primitive idea of mortgaging ought to be referred more to the introduction of order and civilization among mankind, than to the invention of any particular set of people; for, to the tranquility of every commonwealth (depending as it does so greatly on mutual assistance), it is absolutely requisite that recourse should be had, even in its infancy, to this system of lending on security. It is evident that different nations would subject it to different regulations, and in England the Court of Chancery has given rise to the inseparable incidents of redemption and foreclosure. But the general principle must have been common to all mankind, as a necessary effect of the establishment of society. The practice then of lending and borrowing at interest must have existed from the earliest antiquity; but its present prevalence, which is almost universal, may be attributed to the extension of commerce; for commerce could not be carried on without credit, and credit could not be obtained without compensation." Mr. Coventry in Powell on Mortgages, p. 2.

[2] Jones on Mortgages cites Essays on Anglo-Saxon Land Law, p. 106.

nated by the terms *vivum vadium* and *mortuum vadium*.[1] These appear to have been adopted from the customary law of Normandy.[2]

It has been said that there were no mortgages in use in England during the existence of feudal tenures.[3] Although the feudatory could not alien without a license, yet, with the concurrence of his lord, the tenant might have aliened, and consequently have mortgaged the feud.[4] And the feudal lord, it seems, might at all times have mortgaged his lands.[5] After freedom of alienation had been restored, mortgages soon became frequent, and began to occupy the attention of the courts.

§ 397. **The Vivum Vadium,** according to Littleton, signified a living pledge, and applied when the creditor took the estate to hold and enjoy until he paid himself out of the rents and profits, without any limit to the time for redemption; in which case the land survives the debt, and when the debt is discharged, immediately reverts back to the original owner. This form of security has long been nearly obsolete, but seems occasionally to have been substituted in the place of an original mortgage.[6]

§ 398. **The Mortuum Vadium** of Glanville was a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, until which time he received the rents without account, the rents being taken in lieu of interest which, under the name of usury, was anciently regarded as an unchristian abomination.[7] This form

[1] Glanville, Book 10, ch. 6.

[2] Cust., Book 10, ch. 8, § 20. And see Vinnius, Inst., Book 3, tit. 15.

[3] Treatise on Eq., Book 3, ch. 1, § 1.

[4] Feud., Book 2, tit. 5, § 5.

[5] As an instance of this, William, Earl of Poictiers, mortgaged the provinces of Guienne and Poictiers to William Rufus, King of England. 1 Hume's History of England, 270; 4 *Ib.* 30.

[6] In a foreclosure suit, the defendant may set up a subsequent written assignment of the rents to be received until full payment of the debt. Angier v. Masterson, 6 Cal. 61. Where a mortgagee is to have possession and pay the debt from the rents, there can be no foreclosure, unless he has rendered an account. Rankert v. Clow, 16 Tex. 9.

[7] Glanville, Book 10, ch. 6; Coote on Mortgages, ch. 2.

of security was afterwards called the Welsh mortgage. In the time of Littleton the *vadium mortuum* had become a conditional estate, and was what may properly be termed the ancient common law mortgage, which is next to be considered.[1]

§ 399. **Origin of the English Law of Mortgages.**— Before proceeding, it is thought proper to note a few observations in regard to the source from which the law of mortgages, as known to the common law, was derived. Says Chancellor Kent: "The English law of mortgages appears to have been borrowed, in a great degree, from the civil law; and the Roman *hypotheca* corresponds very closely with the description of a mortgage in our law. The land was retained by the debtor, and the creditor was entitled to his *actio hypothecaria*, to obtain possession of the pledge, when the debtor was in default; and the debtor had his action to regain possession, when the debt was paid or satisfied out of the profits, and he might redeem at any time before sale."[2] On the other hand, Mr. Butler is of the opinion that mortgages, in the English law, were strictly founded upon the common law doctrine of conditions.[3] The construction put upon mortgages by the courts of law, and the early law writers, would seem to justify the view taken by the latter;[4] but there can be no doubt that the equitable doctrine of mortgages was derived from the civil law.[5]

§ 400. **A Mortgage at the Common Law** was a feoffment upon the condition that if the feoffor or his heirs paid the sum to the feoffee or his heirs, he should re-enter and

[1] Littleton's Tenures, Book 3, ch. 5, §§ 333, 337.

[2] 4 Kent's Com. 136. "If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor, and if the money was not paid, the creditor had his *actio pignoritia* or *hypothecaria*, which when he had pursued and obtained sentence thereon, he might sell the pledge as his own property." Bac. Abr., Mortgage (A).

[3] Co. Litt., Butler's notes, 1.

[4] Blackstone, following Littleton and others, expressly puts mortgages as estates on condition. 2 Bl. Com. 151-162.

[5] Story's Eq., § 1005; Bac. Abr., Mortgage (A).

re-possess; or according to the more modern form, that then the mortgagee should re-convey the estate to the mortgagor.[1] The estate passed to the mortgagee subject to be defeated upon the performance of the condition. If the mortgagor failed to perform the required condition, at the day, his estate became forfeited, and the mortgagee thereupon held the same absolute and irredeemable.[2] The debt was required to be tendered at the time and place provided; and, in general, the transaction was held subject to the strict rules which govern conditions.[3] But so long as it continued conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee was called the tenant in mortgage.[4]

§ 401. **Origin and Growth of the Doctrine of an Equity of Redemption.**—We have seen that if the mortgagor failed to perform the condition at the time fixed, his estate was, by the common law, wholly gone; and this was true, however great the disparity between the value of the estate and the mortgage debt. The estate of a mortgagor was liable to become forfeited by the merest accident, for a pittance of its value. Says Judge Story: "Courts of equity, acting upon their general principles, could not fail to perceive the necessity of interposing, to prevent such manifest mischief and injustice, which were wholly irremediable at law. They soon arrived at the just conclusion, that mortgages ought to be treated, as the Roman law had treated them, as a mere security for the debt due to the mortgagee; that the mortgagee held the estate, although forfeited at law, as a trust;[5] and that the mortgagor had,

[1] "Sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by another charter." Bac. Abr., Mortgage (A); 2 Bl. Com. 158.

[2] Litt., § 332; Spence's Eq. 601, 602; Story's Eq., § 1004.

[3] Litt., § 332; Co. Litt. 205; Wade's Case, 5 Coke, 114; Goodall's Case, 5 Coke, 96.

[4] Litt., § 332; 2 Bl. Com. 158.

[5] In a note to the above, Judge Story shows that when a mortgage is denominated a trust, and the mortgagee a trustee of the mortgagor, the

what was significantly called, an equity of redemption, which he might enforce against the mortgagee, as he could any other trust, if he applied within a reasonable time to redeem, and offered full payment of the debt and of all equitable charges."[1] But this doctrine of the courts of equity made its way very slowly against the stubborn principles of the common law and the prejudices of its advocates.[2] Even after the equity of redemption was admitted, it was long maintained that, if the money was not paid at the time appointed, the estate became liable in the hands of the mortgagee to dower, and all other his real charges and incumbrances, although the debt was afterwards paid and the estate re-conveyed to the mortgagor;[3] which led to the custom of demising a long term of years only by way of mortgage, instead of mortgaging the fee.[4] "But the courts of equity, as they grew in power, have set this matter right, and have maintained the right of redemption, not only against the tenant in dower and persons who come in under the feoffee, but even against the tenant by the courtesy, and lord by escheat, that are in the *post;* because the payment of the money doth, in the consideration of equity, put the feoffor *in statu quo*, since the lands were

expression is to be taken in a limited and qualified sense. Story's Eq., § 1013, n.

[1] Story's Eq., § 1013.

[2] "Though a strict forfeiture in the case of mortgage was condemned by the Council of Lateran, A. D. 1178, during the reign of Henry II., it is said, Parliament, in 1391, refused to admit a redemption after forfeiture, and such estates continued irredeemable during the reign of Edward IV., who died in 1483." 2 Washb. on Real Prop., 4th ed., 39. But the doctrine seems not long afterwards to have struggled into existence. Butler's note (1) to Co. Litt. 204, *b*. And became established in the reign of Charles I., A. D. 1629. 1 Spence's Eq., 603; How v. Vigures, 1 Rep. in Chancery, 32.

[3] Bac. Abr., Mortgage (A).

[4] In speaking of this form of mortgage, Lord Bacon says: "It was esteemed best for the mortgagor, to avoid all manner of pretensions from the incumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure." Bac. Abr., Mortgage (A).

originally only a pledge for the money lent."[1] Even as late as the time of Lord Hardwicke, it was contended that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back to his own possession by payment of the debt, or other discharge of the condition.[2] The doctrine is now firmly established, however, that the mortgagor has an estate in the land in equity, which, in many respects, will be treated as a legal title. Although, at first, this was purely a notion of equity, it has gradually been adopted by the courts of law, and obtains to a greater or less extent, according as it has been more or less favored in the different States.[3]

§ 402. **Two Opposite Sets of Rules at Law and in Equity.**—We have seen that the introduction of the novel theory of an equity of redemption was strenuously opposed by the judges of the court of common law, and, though ultimately defeated by the increasing power of the court of chancery, they nevertheless, in their own courts, still adhered to the rigid doctrine of forfeiture; the result of which was that the rights of mortgagor and mortgagee in a court of law were very different from what they were in a court of equity. In a court of law, the mortgagee was absolutely entitled, and the estate mortgaged might be de-

[1] Bac. Abr., Mortgage (A).

[2] Casborne v. Scarfe, 1 Atk. 603. And see 1 Greenleaf's Cruise Dig. 570.

[3] 2 Washb. on Real Prop., 4th ed., 96; 4 Kent's Com. 160; Co. Litt. 205, *a*, Butler's note, 96; Coote on Mortgages, 23; White v. Whitney, 3 Mete. 81; White v. Rittenmyer, 30 Iowa, 272; Buchanan v. Munroe, 22 Tex. 537. The doctrine of the American authorities, in effect, is that it serves to vest, by its breach, the estate in the mortgagee, which before was in the mortgagor. 1 Smith's Lead. Cas. (Hare & Wallace's notes), 571; Perkins v. Dibble, 10 Ohio, 433; Runyan v. Mersereau, 11 Johns. 535; Goodwin v. Richardson, 11 Mass. 470; Norwich v. Hubbard, 22 Conn. 587. And that the mortgagor, while in possession, is the legal owner of the property. Fletcher v. Holmes, 32 Ind. 497; Williams v. Beard, 1 S. C. 309; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hilderbrand, 46 Mo. 284. But *contra*, Stewart v. Barrow, 7 Bush (Ky.), 368. After condition broken, the legal title passes to the mortgagee. Johnson v. Houston, 47 Mo. 227. See *infra*, Art. II.

vised by his will, and if he died intestate, descended to his heirs at law; but in equity he had a security only for the payment of money, the right to which, in common with his other personal estate, devolved on his executors or administrators, for whom his devisee or heir was considered to hold it in trust. These contradictory and conflicting rulings gave, for a time, an unsettled character to the doctrine of mortgages.

§ 403. **The Doctrine Reduced to a Just and Harmonious System.**—We have seen that for a long time the mortgagee was known as the owner, in courts of law only; the rights of the mortgagor were recognized in courts of equity only. By the gradual adoption, however, by the courts of law, of the rational and just principles acted upon in equity, a harmonious system has been constructed, and a mortgage is now treated in both courts as a mere security for the debt, and the mortgagee is permitted to use the legal title only for the purposes of making effectual such security.[1] Says Chancellor Kent: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."[2]

ARTICLE II.

THE NATURE OF MORTGAGES IN THE DIFFERENT STATES.

SECTION.

406. Preliminary observations.
407. The modern common-law doctrine of mortgages.
408. How this doctrine has been modified in some States.
409. How superseded by that of equity in other States.
410. The consequence resulting from these different views.
411. A classification of the States in respect thereto.

[1] Harkrader v. Leiby, 4 Ohio St. 602.

[2] 4 Kent's Com. 158.

§ 406. **Preliminary Observations.**—Although the doctrine of mortgages has now become established upon a just and reasonable footing, so that the rights of both mortgagor and mortgagee are secured and enforced, yet the laws of the several States are far from being uniform on the subject. On the contrary, owing for the most part to legislation, there are, perhaps, no two States in which the law of mortgages can be said to be identical in all its details. That part of the law in particular which relates to remedies is closely connected with the systems of civil procedure in the several States, which are quite dissimilar.[1] And in some cases at least, the diversity existing in regard to the interest or estate created by a mortgage, may be ascribed to the adoption of the code system, under which, in several of the States, the courts of law and equity have been, to some extent, blended, by conferring both law and equity jurisdiction upon the same court.

It would be impracticable, as well as inconsistent with the design of the present work, to attempt anything like a general discussion of the rights and remedies of the parties to a mortgage. This branch of the subject belongs rather to the law of actions and defenses than to conveyancing. Yet we shall endeavor to follow a natural and orderly arrangement; and by grouping together, as well as the subject will admit, the rules which have been recognized or adopted in the various States, present not merely the common-law view as to the nature of a mortgage, but also the respects in which that doctrine has been modified or changed by legislation or local laws.

§ 407. **The Modern Common-Law Doctrine of Mortgages.**—In those States in which the common-law system of mortgages prevails, a mortgage possesses a dual character, being one thing in a court of law and another in a court of equity—a conveyance of an estate in lands in the former, and a security for a debt in the latter. After default in the performance of the condition, the estate, at

[1] Jones on Mortgages, Preface to First Edition.

law, vests absolutely in the mortgagee; but in equity the mortgage remains a mere security for the debt.[1] But these two opposite sets of rules, as we have seen, have been shorn of their incongruities, and so adjusted that a perfectly defined system is the result.[2] The mortgagee merely holds the legal title as security for a specific purpose, and neither in a court of law nor of equity is he permitted to use it, except for the purpose of making effectual the security, and to prevent any violation of his rights under the mortgage.[3] As against all persons but the mortgagee, the mortgagor is considered as having the legal estate, and may in every respect deal with the land as his own, subject only to the legal title of the mortgagee so far as such legal title is necessary to his security.[4]

The Supreme Court of Massachusetts has held that a mortgagee is so far the owner in fee of the mortgaged estate, that if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow and recover it or its value of any one who has converted it to his own use.[5]

The mortgage being only security for the debt, the mortgagor has all the rights he ever had against all but the mortgagee.[6]

[1] Welsh v. Phillips, 54 Ala. 309.

[2] *Ante*, § 40.

[3] Bartlett v. Borden, 13 Bush (Ky.), 45; Glass v. Ellison, 9 N. H. 69; Harkrader v. Leiby, 4 Ohio St. 602; Ellison v. Daniels, 11 N. H. 274; Orr v. Hadley, 36 N. H. 575.

[4] Blaney v. Bearce, 2 Greenl. 132; Hitchcock v. Harrington, 6 Johns. 290; Wilkins v. French, 20 Me. 111; Schuylkill Co. v. Thoburn, 7 Serg. & R. 411; Southerin v. Mendum, 5 N. H. 420; Terry v. Rosell, 32 Ark. 478; Bradley v. Fuller, 23 Pick. 8; White v. Whitney, 3 Mete. 81; Orr v. Hadley, 36 N. H. 578; Willington v. Gale, 7 Mass. 138; Cooper v. Davis, 15 Conn. 556; Asay v. Hoover, 5 Pa. St. 21; Clark v. Beach, 6 Conn. 146; Chamberlain v. Thompson, 10 Conn. 243.

[5] Searle v. Sawyer, Sup. Jud. Court of Mass., 9 Cent. L. J. 466.

[6] Wilkins v. French, 20 Me. 111. But it is incorrect to say that a mortgage does no more than to create a mere lien upon the property. It operates a conveyance of the estate by way of pledge or security for the

As between mortgagor and mortgagee, the latter is taken to be the owner of the fee: and, as the right of possession follows the right of property, if there be no clause or agreement to restrain it, he is entitled to possession immediately upon the execution of the mortgage deed, and is liable to be dispossessed only by performance of the condition at the time limited.[1] Sometimes an express stipulation is inserted in the mortgage, to the effect that the mortgagor shall remain in possession of the property mortgaged, until default, which has the effect of a lease of the property by the mortgagee to the mortgagor. The latter, becoming the tenant of a term, cannot, therefore, be dispossessed during the term. And in the absence of such a stipulation, it is almost the universal practice, founded upon a presumed or tacit assent, for the mortgagor to retain the possession; but technically he holds it solely at the will and by the permission of the mortgagee, who may, at any time, by entry or ejectment, recover the same.[2] In that case, also, until the mortgagee has regularly recovered possession, by writ of entry or ejectment, the mortgagor is considered, in some sort, a tenant to the mortgagee, and cannot be treated by him as a trespasser.[3]

There is much discussion in the books as to the nature of the tenancy existing between mortgagor and mortgagee under such circumstances, the mortgagor being sometimes

debt, and gives the mortgagee the benefit of all the doctrines applicable to *bona fide* purchasers. 4 Kent's Com. 129; Hardraker v. Leiby, 4 Ohio St. 602.

[1] Erskine v. Townsend, 2 Mass. 493; Goodwin v. Richardson, 11 Mass. 469; Fay v. Brewer, 3 Pick. 203; Flagg v. Flagg, 11 Pick. 475; Blanchard v. Brooks, 12 Pick. 47; Brown v. Stewart, 1 Md. Ch. 87; Furbush v. Goodwin, 29 N. H. 321; Fay v. Cheney, 14 Pick. 399; Bradley v. Fuller, 23 Pick. 1; Hemphill v. Ross, 66 N. C. 479; Tryon v. Munson, 77 Pa. St. 250; Coffey v. Hunt, 75 Ala. 236.

[2] Story's Eq., § 1017; 4 Kent's Com. 155.

[3] 4 Kent's Com. 155, 156. Neither a mortgagor nor his assignee can hold the premises adversely to the mortgagee, unless the assignee be a purchaser without notice of the mortgagee; otherwise they are mere tenants at the will of the mortgagee. Newman v. Chapman, 2 Rand. (Va.) 93. But see Pettengill v. Evans, 5 N. H. 54.

spoken of as a tenant at will, and sometimes as a tenant by sufferance; but neither of these definition are quite accurate.[1] The term anciently applied was that of "tenant in mortgage," and perhaps this is the most appropriate one that can be used. There is no reservation of rent; the contract between the parties is for the payment of interest, and not for the payment of rent. Although the mortgagee may assume the possession by ejectment at his pleasure, and may give notice to the tenant to pay him the rent due at the time of the notice,[2] yet if he suffers the mortgagor to remain in possession, or in receipt of the rents, it is a privilege belonging to his estate, that he cannot be called upon to account for the rents and profits to the mortgagee.[3]

To sum up, though the equity of redemption in the mortgaged premises may be devised, granted, levied upon and set off in execution;[4] though the wife of the mortgagor is entitled to dower, and the husband may be tenant by the curtesy;[5] though the mortgagor in possession may

[1] Story's Eq., § 1017; 4 Kent's Com. 155.

[2] Moss v. Gallimore, Doug. 279; Clark v. Abbott, 1 Md. Ch. 474; Mansony v. U. S. Bank, 4 Ala. 735; Coker v. Pearsale, 6 Ala. 542; Hutchinson v. Deering, 20 Ala. 798; Welch v. Adams, 1 Metc. 494; Branch Bank v. Fry, 23 Ala. 770; Babcock v. Kennedy, 1 Vt. 457; Crosby v. Harlow, 21 Me. 499; Stone v. Patterson, 19 Pick. 476.

[3] 4 Kent's Com. 155; Colman v. Duke of St. Albans, 3 Ves. Jr. 25; Fitchburg Man. Corp. v. Melven, 15 Mass. 268; Hemphill v. Ross, 66 N. C. 477; Adams' Eq. 114; Syracuse City Bank v. Tallman, 31 Barb. 201; Wilder v. Houghton, 1 Pick. 87; Boston Bank v. Reed, 8 Pick. 459. Mortgagee entitled to collect rent without a special provision in the mortgage. Goodwin v. Keney, 49 Conn. 563. A mortgagee is not entitled to the rent of the mortgaged premises from the tenant of the mortgagor till he takes possession or requires the tenant to attorn to him. Prior thereto the mortgagor is entitled to the rent. Long v. Wade, 70 Me. 359; Teal v. Walker, 111 U. S. 242.

[4] Kennett v. Plummer, 28 Mo. 142. His conveyance is so far a conveyance of the land, that the covenants real are annexed to it and pass with it to the grantee and his assigns. White v. Whitney, 3 Metc. 81. After a sale upon execution the mortgagor has no right in the land, unless he redeems it, or unless the judgment upon which the execution was issued be reversed. Delano v. Wilde, 11 Gray, 17.

[5] Maybury v. Brien, 15 Pet. 38; Simonton v. Gray, 34 Me. 50; Gibson v. Crehore, 3 Pick. 475; 1 Washb. on Real Prop., 4th ed., 206. But see *contra*, Dixon v. Saville, 1 Bro. Ch. 326; Steele v. Carroll, 12 Pet. 205.

acquire a settlement, and is a freeholder;[1] though he may maintain a real action for the land against a stranger, and the mortgage cannot be set up as a defense;[2] and though the mortgagee has only a security for his debt,[3] the legal title vests in him, subject to be defeated only upon performance of the condition; and after condition broken, the estate of the mortgagor is forfeited at law, and his only relief is in equity.[4] As between the mortgagor and mortgagee, the legal title is in the latter, and so remains even after the debt is paid, if not paid until after the law day, and cannot revest without a deed.[5]

§ 408. **How this Doctrine has been Modified in some States.**—The common-law rules have been variously modified in their application in different States, by the circumstances of the particular cases growing out of local laws governing the subject-matter. Following the plan indicated at the head of the present article, we shall not attempt to trace these various modifications in their effect upon the rights and remedies of the parties, further than may be necessary to an orderly classification of the character and qualities given to mortgages in the different States.

"In some of the States," says Mr. Washburn, "while it is assumed that a mortgage deed creates an interest in

[1] State v. Ragland, 75 N. C. 12.

[2] Ellison v. Daniels, 11 N. H. 274; Huckins v. Straw, 34 Me. 166; Stinson v. Ross, 51 Me. 556; Bird v. Decker, 64 Me. 550; Hall v. Lance, 25 Ill. 277; Doe v. McLoskey, 1 Ala. 708; Bartlett v. Borden, 13 Bush (Ky.), 45.

[3] Harkrader v. Leiby, 4 Ohio St. 602; Orr v. Hadley, 36 N. H. 575; Bartlett v. Borden, 14 Bush (Ky.), 45; Glass v. Ellison, 9 N. H. 69; Ellison v. Daniels, 11 N. H. 274; Wilkins v. French, 20 Me. 111.

[4] Chamberlain v. Thompson, 10 Conn. 243. A mortgagor of land, as between himself and his mortgagee, has only an equitable title. He cannot, therefore, recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgage. Brobst v. Brock, 10 Wall. 519.

[5] Chamberlain v. Thompson, 10 Conn. 243; Cross v. Robinson, 21 Conn. 379; Cooch v. Gerry, 3 Harr. (Del.) 280. In Illinois, a mortgagee being the owner of the fee, may, after condition broken, maintain ejectment against the mortgagor. Johnson v. Watson, 87 Ill. 538; Fisher v. Millmine, 94 Ill. 328.

the mortgaged premises, answering to an estate in the mortgagee, his rights and remedies in respect to the same are limited to such as the rules of equity prescribe, and may not be enforced by suit at law."[1] This doctrine is the outgrowth of the equitable idea that a mortgage is merely a security for a debt, and prevails to a greater or less extent in most of the States in which the common-law doctrine of mortgages exist. In New Jersey, it was held that the right to enter was postponed, and the possession was in the mortgagor, until the condition was broken by default in the payment of the mortgage money.[2] But "with this modification of the rights of the mortgagee, as to the postponement of ability to obtain possession of the mortgaged premises, the nature of the mortgage as a conveyance remains as it was at common law."[3] So, in Vermont, it is provided by statute that "every mortgagor shall, until condition broken, be deemed to have, as against the mortgagee, the legal right of possession to the mortgaged premises, unless it shall be otherwise stipulated in the mortgage deed."[4] Upon breach of the condition, the mortgagee has a right to immediate possession; and may enter or maintain ejectment therefor.[5] But until he asserts this right, the mortgagor in possession is regarded as the owner of the land, and may use and occupy it without being liable to account to the mortgagee.[6] This is substantially the doctrine recognized in Missouri, where it is said: "The modern doctrine is well established, that a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given; and until the mortgagee enters for breach of the conditions, and in many respects until final foreclosure of

[1] 2 Washb. on Real Prop., 4th ed., 105.

[2] Sanderson v. Price, 21 N. J. L. 646.

[3] Shields v. Lozear, 34 N. J. L. 501.

[4] Gen. Stats. 1880, § 1258.

[5] Hagar v. Brainard, 44 Vt. 294; Fuller v. Eddy, 49 Vt. 11. See Cheever v. Rutland, etc. R. R., 39 Vt. 653.

[6] Walker v. King, 44 Vt. 601; Hooper v. Wilson, 12 Vt. 695.

the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and in every respect to deal with the mortgaged premises as the owner, so long as he is permitted to remain in possession."[1]

After condition broken the legal title passes to the mortgagee, and he may maintain ejectment for the mortgaged land.[2] To some extent this is true in Mississippi;[3] also in Delaware.[4] And it seems to be the prevailing doctrine that a mortgage, though a conveyance in fee upon condition, is, even after condition broken, and after the legal title passes, merely a security for the debt, which security is extinguished, and the title reverts whenever the debt is paid.[5] The latter conclusion will necessarily follow whenever the mortgage is regarded as a common-law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose.[6]

§ 409. **The Doctrine of Equity** has entirely superseded that of the common law in several of the States, so that a mortgage, both before and after a breach of the condition, is regarded as only a lien upon the property. It is a mere security of a personal nature, and passes no estate in the land. The title remains in the mortgagor until foreclosure, subject to the lien of the mortgage. The mortgagee, before foreclosure, has no legal interest in the mortgaged premises, and consequently is not entitled to possession.[7]

[1] Kennett v. Plummer, 28 Mo. 145; Woods v. Hilderbrand, 46 Mo. 284.

[2] Walcop v. McKinney, 10 Mo. 229; Sutton v. Mason, 38 Mo. 121; Johnson v. Houston, 47 Mo. 227; Reddick v. Gressman, 49 Mo. 389.

[3] "Although the mortgagee has a chattel interest only, yet, in order to render his pledge available, and give him the intended benefit of his security, it is considered as real property, to enable him to maintain ejectment for the recovery of the land mortgaged." Buckley v. Daley, 45 Miss. 338; Carpenter v. Bowen, 42 Miss. 28, 49; Hill v. Robertson, 24 Miss 368.

[4] Hall v. Tunnell, 1 Houst. 320.

[5] Pease v. Pilot Knob Iron Co., 49 Mo. 124, 4 Kent's Com. 194, notes *b* and *c*.

[6] Shields v. Lozear, 34 N. J. L. 505.

[7] Dutton v. Warschauer, 21 Cal. 609, 623; Vason v. Ball, 56 Ga. 269; Fletcher v. Holmes, 32 Ind. 497, 513; White v. Rittenmyer, 30 Iowa, 268; Vanderslice v. Knapp, 20 Kan. 647; Robbins v. Sackett, 23 Kan. 304;

The courts of New York, following the lead of Lord Mansfield,[1] were the first to move in this direction, by considering a mortgage to be a mere security for the debt, and denying the legal character of the mortgagee's title prior to a breach of the condition and a taking of possession by the mortgagee in consequence.[2] As in New York, the adoption of equitable principles by the courts of law, has been followed by legislative enactments taking from the mortgagee the right of possession.[3] Likewise, in other States the same doctrine has, in many instances, been supplemented by the total abrogation, by statute, of the common-law doctrine.[4] The development of this doctrine may

Chick v. Willets, 2 Kan. 384; Life Association v. Cook, 20 Kan. 19; Duclaud v. Rosseau, 2 La. Ann. 168: Albright v. Cobb, 34 Mich. 316; Wagar v. Stone, 36 Mich. 364; Humphrey v. Hurd, 29 Mich. 44; Adams v. Corriston, 7 Minn. 456; Hurley v. Estes, 6 Neb. 386; Merritt v. Bartholick, 36 N. Y. 44: Besser v. Hawthorn, 3 Oreg. 129; Wright v. Henderson, 12 Tex. 43: Wood v. Trask, 7 Wis. 566; Buck v. Payne, 52 Miss. 271; Buckley v. Daley, 45 Miss. 338; Myers v. Estell, 48 Miss. 373; Central Trust Co. v. Wabash, St. L. & P. R. R. Co., 30 Fed. Rep. 332.

[1] Mr. Coventry, in a note to Powell on Mortgages, 266, in commenting upon the doctrine announced by Lord Mansfield in Martin v. Mowlin, 2 Burr. 978, Wren v. Buckley, Doug. 292, and Eaton v. Jacques, 2 Doug. 455, observes that his Lordship obviously considered a mortgage to be even at law a mere security for the debt, and not an actual conveyance. "But," says he, "this view of a mortgage in a court of law is clearly erroneous, and hath since been exploded by the universal concurrence of the judges."

[2] Jones on Mortgages, § 13, and cases cited.

[3] Rev. Stat., § 57, p. 312; Miner v. Beekman, 42 How. Pr. 36.

[4] California, Civil Code, 1885, § 2927; Colorado, Civil Code, 1887, § 261; Dakota Territory, Rev. Code, 1883, § 1733: Florida, Bush. Dig. Stat., 1872, pp. 611, 612; Georgia, Code, 1873, § 1954; Indiana, G. & H. Stat. 1872, p. 335; Iowa, Code, 1880, § 1938; Kansas, Dassler's Stat., 1876, ch. 68, § 1: Louisiana, Code 1870, art. 3278; Michigan, Annotated Stat. 1882, § 7847; Minnesota, Gen. Stat., 1878, ch. 75, § 29; Montana Territory, Comp. Stat., 1887, § 371; Nebraska, Comp. Stat., 1885, p. 482, ch. 61, § 35; Nevada, Gen. Stat., 1885, § 3284: New Mexico, Comp. Laws, 1884, § 1593; Oregon, Anno. Laws, 1887, § 326: South Carolina, Gen. Stat., 1882, § 2299: Utah Territory, Civil Practice Act, 1870, § 260; Washington Territory, Code, 1881, § 546; Wisconsin, Rev. Stat., 1878, § 3095. The common-law view of mortgages at one time prevailed in Kentucky, and it was then held that a mortgage passes the legal title to real estate to

be illustrated by the language of the Supreme Court of California: "It was from a consideration of the character of the instrument as settled by these decisions, and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or incumbrance, and not passing any estate in the premises."[1] The courts in some of the States have gone further in this direction than in others; consequently, there is, to a greater or less extent, the same lack of uniformity in the incidents pertaining to the relation of mortgagor and mortgagee in the States in which this doctrine has been adopted, as where the common law prevails. There are, however, certain incidents pertaining to these different theories of the nature of a mortgage, which follow more or less as natural conclusions, and which we shall proceed to notice.

§ 410. **The Consequences Resulting from these Different Views** of the nature of a mortgage are chiefly the

the mortgagee. Stewart v. Barrow, 7 Bush, 371. But since the adoption of the Civil Code and under late decisions of the court of that State, the equitable system prevails, and a mortgage is regarded as a mere security for the debt, the mortgagor being the real owner both in law and equity. Woolley v. Holt, 14 Bush, 791. The English rule that a mortgage conveys the title in fee to the mortgagee is not adopted in Wisconsin. It merely creates a lien on the land. The decisions in that State to the effect that, if the mortgagee gets the peaceable possession after condition broken, he cannot be ejected by the mortgagor without first tendering the amount due on the mortgage, are no recognition of the English doctrine, but simply of the right of the pledgee to take possession of the pledge if he can, in order to pay himself out of the rents and profits. Brinkman v. Jones, 44 Wis. 498.

[1] Dutton v. Warschauer, 21 Cal. 623.

following: Under the common-law view, as the right of possession follows the right of property, the mortgagee is entitled to possession of the mortgaged premises, unless restrained by the terms of the mortgage; and upon default he is always entitled to possession, and may recover it by ejectment. Under the equitable view, upon the same principle the mortgagor is entitled to possession until foreclosure, unless by express contract he shall give that right to the mortgagee. In the next place, when the interest of the mortgagee is treated as an estate in land, it cannot, under the Statute of Frauds, be assigned without a deed or note in writing, signed by the mortgagee or his agent—except by the act or operation of law, as provided by the third section of that statute. On the other hand, treating the interest created by the mortgage as a mere lien of a personal nature, it can only be assigned by a transfer of the debt, and a conveyance or assignment, by the mortgagee, of the mortgaged premises, without specifically assigning the debt or what is equivalent, would be simply void. Lastly, while under the common-law view of a mortgage, a tender or payment, to defeat the mortgagee's title, must be made at or before the law day, as the day fixed for payment is termed, under the equitable view, payment at any time before sale, or before the time for redemption has expired, including legal costs, will discharge the mortgage, and no re-conveyance is necessary. These, as we have said, are the legitimate conclusions following the different view of the nature of mortgages, when carried to their ultimate results.[1] A partial blending, in some of the States of these two theories has given rise to more or less confusion in this respect, in the doctrines of those States.

§ 411. **A Classification of the States** in respect to these different views of the nature of a mortgage, for the reason just stated, can only be attempted at a hazard. Yet, as remarked by Mr. Washburn: "The importance of this classification, if well founded, will be obvious, when it is re-

[1] See Jones on Mortgages, 4th ed,, § 15.

membered how frequently, in discussing questions growing out of mortgages, cases are cited as authorities in the court of one State, which were decided in another in which a different system prevails."[1] The difficulty above suggested is well illustrated in the fact that such eminent writers on the subject as Mr. Washburn and Mr. Jones differ in regard to this classification of the States.[2]

From the cases cited, we assume that the common law system of mortgages prevails in the following States: Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Ohio, Pennsylvania, Roode Island Tennessee, Virginia and West Virginia.[3] That in Delaware, Missouri, New Jersey and Vermont, the common-law doctrine has been so modified or blended with that of equity that the mortgagee is not entitled to possession until after condition broken.[4] And that in California, Colorado, Dakota Territory, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississsippi, Montana Territory, Nebraska, Nevada,

[1] 2 Washb. on Real Prop., 4th ed., 106.

[2] See Jones on Mortgages, 4th ed., §§ 58, 59; 2 Washb. on Real Prop., 4th ed., 106.

[3] Welch v. Phillips, 54 Ala. 309; Toomer v. Randolph, 60 Ala. 356; Terry v. Rosell, 32 Ark. 479; Reynolds v. Canal and Banking Co. of N. O., 30 Ark. 520; Chamberlain v. Thompson, 10 Conn. 243; Cross v. Robinson, 21 Conn. 379; Clinton v. Westbrook, 38 Conn. 9; Carroll v. Ballance, 26 Ill. 9; Harper v Ely, 70 Ill. 581; Karnes v. Lloyd, 52 Ill. 113; Erickson v. Rafferty, 79 Ill. 209; Maine Rev. Stat., 1883, ch. 90, § 2; Wilkins v. French, 20 Me. 111; Brown v. Stewart, 1 Md. Ch. 87; Annapolis & E. R. R. Co. v. Gantt, 39 Md. 115; Ewer v. Hobbs, 5 Metc. 1; Howard v. Robinson, 5 Cush. 119; Norcross v. Norcross, 105 Mass. 265; Furbush v. Goodwin, 29 N. H. 321; Brown v. Cram, 1 N. H. 169; Hemphill v. Ross, 66 N. C. 477; State v. Ragland, 75 N. C. 12; Harkrader v. Leiby, 4 Ohio St. 602; Youngman v. Elmira, etc. R. R. Co., 65 Pa. St. 278; Tryon v. Munson, 77 Pa. St. 250; Carpenter v. Carpenter, 6 R. I 542; Henshaw v. Wells, 9 Humph. (Tenn.) 568; Vance v. Johnson, 10 *Id.* 214; Faulkner v. Brockenbrough, 4 Rand. (Va.) 245.

[4] Hall v. Tunnell, 1 Houst. 320; Buckley v. Daley, 45 Miss. 338; Johnson v. Huston, 47 Mo. 227; Shields v. Lozear, 35 N. J. L. 501; Sanderson v. Price, 21 N. J. L. 646; Walker v. King, 44 Vt. 601; Hagar v. Brainerd, 44 Vt. 294.

New Mexico, Oregon, South Carolina, Utah Territory, Washington Territory and Wisconsin, the equitable view of mortgages prevails. The civil law, in force in Louisiana, is very similar to the last mentioned doctrine.[1]

[1] See the statutes cited in note to § 409.

CHAPTER IX.—Form and Requisites of a Mortgage.

ARTICLE I. What Constitutes a Mortgage.
II. A Classification of the Different Kinds of Mortgages.
III. Form Generally.
IV. The Granting Part of a Mortgage.
V. The Defeasance.
VI. Special Stipulations.
VII. The Power of Sale.

ARTICLE I.

WHAT CONSTITUTES A MORTGAGE.

SECTION.
413. The general requisites of deeds apply to mortgages.
414. What is essential to constitute a mortgage at law.
415. What will constitute a mortgage in equity.
416. Parol evidence to prove an absolute deed a mortgage.
417. Whether a mortgage or a conditional sale.

§ 413. **The General Requisites of Deeds Apply to Mortgages.**—A mortgage will be vitiated by the same causes that an absolute deed would be, and to be entitled to registration, is generally required to be executed and acknowledged with the same formalities as other conveyances of real estates.[1] The distinctions in regard to the time of filing mortgages for record in some States, and

[1] It must be under seal. Bower v. Oyster, 3 Pa. 239; Hebron v. Centre Harbor, 11 N. H. 571.

also as to the method of relinquishing the right of homestead, have been noted in a former part of this work, to which the reader is referred.[1] Attention is also called to the chapter treating of the General Requisites of Deeds, their Execution, Acknowledgment and Registration.[2] These subjects are introduced here for the special purpose of reminding the reader that the three essential elements to every mortgage are, *first*, a mortgagor, who must be a person or corporation capable of granting, conveying or assigning the land or thing mortgaged, and not disabled by any legal or natural impediment; *second*, a mortgagee, who must be a person capable of receiving a grant or assignment of the premises;[3] and *third*, a thing mortgaged,[4] which must be granted or assigned in that order and manner which the law requires, and which is to form the subject of inquiry in the present chapter.

§ 414. **What is Essential to Constitute a Mortgage at Law.**—To constitute a mortgage at law two things are necessary: *First*, a conveyance of the property; *second*, a contemporaneous agreement that such conveyance shall be a security. In some of the States, by statute, every conveyance made to secure the payment of money or the performance of any other thing in the condition thereof stated, is held a mortgage.[5] In many of the States, where a conveyance of real estate is made which by another instrument or writing shall be made defeasible or shown to be by way of mortgage, such other instrument must be recorded there-

[1] *Ante*, §§ 183, 273.

[2] Chapters I., III., IV. A mortgage is generally considered a deed, and its execution governed by the same laws and formalities. Stimson's Amer. Stat., § 1858.

[3] The fact that a mortgagee is a trustee for himself and others, does not change the character of the instrument as a mortgage. Cormerais v. Genella, 22 Cal. 116.

[4] Everything which is the subject of contract, or which may be granted or assigned, is capable of being mortgaged. Neligh v. Michenor, 11 N. J. Eq. 539.

[5] N. H. Gen. Laws 1878, ch. 136, § 1; Cal. Hitt Code 1876, § 792; Dak. Civ. Code, § 1724; Florida Dig. 1881, ch. 153, § 1.

with or the grantee takes nothing under the principal conveyance.[1] In others, however, unless the defeasance be recorded, the first conveyance passes an absolute title except as against the maker of the instrument, his heirs or devisees.[2] The defeasance, or agreement to reconvey, may be contained either in the instrument of conveyance, or in a separate deed, executed at the same time.[3] But to constitute a mortgage, the conveyance and defeasance must be a part of the same transaction, and must take effect at the same time.[4] Moreover, the defeasance must be an instrument

[1] N. Y. Rev. Stat., Part 2, ch. 3. tit. 3; N. J. Rev. Stat. 1877, ch. 21; Neb. Comp. Stat. 1881. Part 1. ch. 73. art. 25; Md. Rev. Code 1878, art. 66, § 42; Del. Rev. Code 1874. ch. 83. § 18: Dak. Civ. Code. § 1740.

[2] Wis. Rev. Stat. 1878, § 2243: Mass. Pub. Stat. 1882. ch. 120. § 23; Me. Rev. Stat. 1883, ch. 73. § 9; Penn. Brightley's Purd. Dig. 1872, ch. 1881, § 91; Ind. Rev. Stat. 1881. § 2932; Mich. How. Annot. Stat., § 5686; Minn. Gen. Stat. 1878, ch. 40, § 23; Kansas Comp. Laws 1879. ch. 68, § 2; Oregan Gen. Laws 1872, ch. 6, § 22; Dak. Civ. Code. § 1741: Ala. Code 1876. § 2168.

[3] McLaughlin v. Shepherd, 32 Me. 143; Shaw v. Erskine, 43 Me. 371; Mills v. Darling, *Id.* 565; Warren v. Lovis, 53 Me. 463; Blaney v. Bearce, 2 Me. 132; Archambau v. Green, 21 Minn. 520: Bayley v. Bailey, 5 Gray, 504; Freeman v. Baldwin, 13 Ala. 246; Knowlton v. Walker, 13 Wis. 264: Plato v. Roe, 14 Wis. 453; Walker v. Tiffin Mining Co., 2 Col. 89; Peterson v. Clark, 15 Johns. 205: Dimond v. Enoch. Addison (Pa.), 357; Payne v. Patterson, 77 Pa. St. 134; Kerr v. Gilmore, 6 Watts (Pa.), 405; Stoever v. Stoever, 9 Serg. & R. 434; Colwell v. Woods, 3 Watts, 188; Preschbaker v. Feaman. 32 Ill. 475; Harbison v. Lemon, 3 Blackf. (Ind.) 51; Watkins v. Gregory, 6 *Id.* 113; Crassen v. Swoveland, 22 Ind. 427; Baxter v. Dear, 24 Tex. 17. A deed conveying the fee and purporting by its terms to be absolute, although it be expressed to be executed as collateral security for the payment of money, is not a mortgage within the operation of the Maryland code. art. 24, § 29. Snowden v. Pitcher, 45 Md. 260.

[4] Bennock v. Whipple, 12 Me. 346. See Newhall v. Burt, 7 Pick. 157; Swetland v. Swetland, 3 Mich. 482; Clement v. Bennett, 70 Me. 207; Montgomery v. Chadwick, 7 Iowa, 114; Vance v. Lincoln, 38 Cal. 586; Booth v. Hoskins (Cal.), 17 Pac. Rep. 225. In order to create a mortgage by an absolute deed and a deed of defeasance. the dates of the two instruments need not be the same: it is sufficient if both be delivered at the same time. Harrison v. Phillips Academy, 12 Mass. 456; Newhall v. Burt, 7 Pick. 157; McIntier v. Shaw, 6 Allen, 83. See Scott v. Henry, 13 Ark. 112. But it is essential that they be delivered at the same time. Kelleran v. Brown, 4 Mass. 443; Kelly v. Thompson, 7 Watts, 401;

of as high a nature as the deed itself; and consequently a writing not under seal cannot, at law, operate as a defeasance of an absolute deed.[1] It is not essential that the deed and defeasance should, in terms, refer to each other. If the conveyance and the agreement to reconvey on payment of the sum loaned are of even date, the transaction is necessarily a mortgage.[2] If the two instruments are of different dates, parol evidence may be introduced for the purpose of showing that they are parts of the same transaction, and that together they were intended to constitute a mortgage.[3] It was formerly a common practice to make a mortgage by an absolute conveyance, with a defeasance or clause of redemption in a separate deed. The great inconvenience attending this mode of mortgaging was,

Haines v. Thompson, 70 Pa. St. 434. Where a deed was executed simultaneously with the grantor's taking from the grantee a bond for reconveyance upon the re-payment of the money borrowed, it was held that the two instruments constituted a mortgage. Clark v. Lyon, 46 Ga. 202.

[1] Kelleran v. Brown, 4 Mass. 443; Flint v. Sheldon, 13 Mass. 444; Cutler v. Dickerson, 8 Pick. 386; Flagg v. Mann, 14 *Id.* 467; Scituate v. Hanover, 16 *Id.* 222; Murphy v. Calley, 1 Allen, 107; Warren v. Lovis, 53 Me. 463. But see Harrison v. Phillips Academy, 12 Mass. 456; Runlet v. Otis, 2 N. H. 167. The defeasance of an actual deed, executed by an agent for his principal, without a power of attorney, will not convert such deed into a mortgage. Gratz v. Phillips, 1 Pa. 333. But a condition written upon the back of a deed, and not signed, was held to be a part of the deed which was therefore regarded as a mortgage. Whitney v. French, 25 Vt. 663. And see Baldwin v. Jenkins, 23 Miss. 206.

[2] Parol evidence of a different understanding by the parties will not, in such case, be received to convert it into a conditional sale. Kerr v. Gilmore, 6 Watts, 405. See Brown v. Nickle, 6 Pa. St. 390. A contract purporting to be a sale, by the terms of which the purchaser is to sell the property and out of the proceeds pay an antecedent debt of the seller, with interest and expenses, any excess to be returned to the seller, and any deficiency to be made good by him, is, in effect, a mortgage. Cannon v. McNab, 48 Ala. 99. A conveyance with an agreement to reconvey is not necessarily a mortgage. Whether it will be so treated depends upon the circumstances of the case. Horbach v. Hill, 112 U. S. 144.

[3] Kelly v. Thompson, 7 Watts, 401; Tillson v. Moulton, 23 Ill. 648; Preschbaker v. Feaman, 32 Ill. 475; Gay v. Hamilton, 33 Cal. 686; Teal v. Walker, 111 U. S. 242.

that if the second deed was lost, there appeared to be an absolute title in the mortgagee.[1] For many years the almost universal practice has been to insert the condition of defeasance in the conveyance, which renders the transaction less exposed to fraud and deceit.[2]

§ 415. **What will Constitute a Mortgage in Equity.**— In equity, the general rule that any conveyance intended as a security is a mortgage, is of universal application, and has been applied to all sorts of securities.[3] And in several of the States, every deed conveying real estate which shall appear by any other instrument in writing to have been intended only as a security in the nature of a mortgage, though an absolute conveyance in terms shall be considered as a mortgage.[4] Thus, an absolute deed with a defeasance in writing not under seal,[5] or resting merely in parol,[6] constitutes a mortgage. So, too, there are other transactions in which no legal interest in the property passes to the creditor, which are subject to the principles upon which the ordinary rules of redemption and foreclosure are founded. These will be noticed more particularly in a future article.[7]

[1] Powell on Mortgages, 7, note *g*.

[2] See Cotterell v. Purchase, Cas. Temp. Talb. 61; Bac., Tracts, 37.

[3] White v. Lucas, 46 Iowa, 319; Crane v. DeCamp, 21 N. J. Eq. 414; Harper's Appeal, 64 Pa. St. 315; Klinck v. Price, 4 W. Va. 4; Wilmerding v. Mitchell, 42 N. J. L. 476; Odell v. Montrose, 68 N. Y. 499; Shillaber v. Robinson, 97 U. S. 68; Bennett v. Wolverton, 24 Kan. 284; Hoffman v. Ryan, 21 W. Va. 415. And see *post*, § 425.

[4] N. Y. Rev. Stat., Part 2, ch. 3, tit. 3; N. J. Rev. Stat. 1877, ch. 21; Ill. Cothran's Stat. 1883, ch. 95, § 12; Neb. Comp. Stat. 1881, Part 1, ch. 73, art. 25; Md. Rev. Code 1878, art. 66, § 42.

[5] Chase v. Peck, 21 N. Y. 581; Kelleran v. Brown, 4 Mass. 443; Walkenhorst v. Lewis, 24 Kan. 420; Cutler v. Dickinson, 8 Pick. 386; Clark v. Finlon, 90 Ill. 245; Flagg v. Mann, 14 Pick. 467; Sharkey v. Sharkey, 47 Mo. 543; Robinson v. Willoughby, 65 N. C. 520; Pearce v. Wilson, 111 Pa. St. 14; Bunker v. Barron (Me.), 8 Atl. Rep. 253.

[6] *Infra*, § 416; Littlewort v. Davis, 50 Miss. 403; Weide v. Gehl, 21 Minn. 449; O'Neil v. Capelle, 62 Mo. 202; Ruckman v. Alwood, 71 Ill. 155; Low v. Graff, 80 Ill. 360; Freeman v. Wilson, 51 Miss. 329; Reed v. Reed, 75 Me. 264.

[7] *Infra*, Art. II.

A mortgage being intended simply for security, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower, courts of equity have strenuously resisted all attempts to abridge the right of redemption, and held even express agreements for that purpose to be wholly void.[1] The maxim upon which they proceed is "once a mortgage, always a mortgage."[2] Therefore, an agreement in a mortgage, or an instrument in the nature of a mortgage, that upon breach of the condition the property shall become absolute in the mortgagee, is a nullity.[3] So it has been held, that a deed, conditioned to become void unless a certain amount is paid by a day certain, is in effect a mortgage from the debtor to the creditor, and subject to redemption as such.[4] Or if the vendor of real estate retain the legal title as security for the purchase-money, it has the effect of a mortgage for that purpose.[5] In short, whenever the parties to an instrument, at the time of its execution, intend it as a security, whatever may be its form, equity will consider it a mortgage: and no terms or words used in it will be allowed to change its character, and cut off the right of redemption.[6]

[1] Williams on Real. Prop. 393; Coote on Mortgages, 49; Briggs v. Seymour, 17 Wis. 255; Cherry v. Bowen, 4 Sneed 415; Zekind v. Newkirk, 12 Ind. 544.

[2] Wilson v. Giddings, 28 Ohio St. 554. The rule will not be applied when it would operate fraudulently on subsequent purchasers without notice. Miami. etc. Co. v. Bank, etc., Wright, 249. But if a purchaser takes a conveyance from the grantee, with knowledge that the grantor claims an interest in the property, he takes it charged with the same equities with which it was charged in the hands of the mortgagee. French v. Burns, 35 Conn. 359.

[3] Walling v. Aiken, 1 McMullen Ch. 1; Ferguson v. Miller, 4 Cal. 97.

[4] Austin v. Downer, 25 Vt. 558; Carr v. Holbrook, 1 Mo. 240.

[5] Cleveland v. Martin, 2 Head (Tenn.), 128; Pugh v. Holt, 27 Miss. 461.

[6] Robinson v. Farrelly, 16 Ala. 472; Delahay v. McConnel, 5 Ill. 157; Richardson v. Barrick, 16 Iowa, 407; Holliday v. Arthur, 25 Iowa, 19; Howe v. Russell, 36 Me. 115; Artz v. Grove, 21 Md. 456; Bank of Westminster v. Whyte, 1 Md. Ch. 536; Parks v. Hall, 2 Pick. 211; Steel v. Steel, 4 Allen, 417; Phœnix v. Gardner, 13 Minn. 430; Vasser v. Vasser,

§ 416. **Parol Evidence to Prove an Absolute Deed a Mortgage.**—How far a deed absolute in its terms may be shown by parol evidence to have been intended as a mortgage, in apparent conflict with the Statute of Frauds, is a question which has given rise to much discussion and more or less diversity of opinion in the courts of the different States. But with the exception of those States in which the exercise of this power is prohibited by statute,[1] it is now regarded as the settled doctrine, that in equity an absolute deed may be converted into a mortgage, whenever the fact is once established that it was so intended;[2] though as

23 Miss. 378; Davis v. Clay, 2 Mo. 161; Wilson v. Drumrite, 21 Mo. 325; Somersworth v. Roberts, 38 N. H. 22; DeCamp v. Crane, 19 N. J. Eq. 166; Bingham v. Thompson, 4 Nev. 224; Cotterell v. Long, 20 Ohio, 464; Miami, etc. Co. v. United States Bank, Wright (Ohio), 249; Pattison v. Horn, 1 Grant (Pa.) Cas. 301, 304; Halo v. Schiek, 57 Pa. St. 320; Nichols v. Reynolds, 1 R. I. 30; Bennett v. Union Bank, 5 Humph. (Tenn.) 612; McCan v. Marshall, 7 *Id.* 121; Webb v. Patterson, 7 *Id.* 431; Hinson v. Partee, 11 *Id.* 587; Yarbrough v. Newell, 10 Yerg. (Tenn.) 376; Nichols v. Toney, 3 Head, 655; Catlin v. Chittenden, Brayt. (Vt.) 163; Campbell v. Worthington, 6 Vt. 448; Mott v. Harrington, 12 Vt. 119; Wright v. Bates, 13 Vt. 341; Rogan v. Walker, 1 Wis. 527; Yates v. Yates, 21 Wis. 473; French v. Burner, 35 Conn. 359; Shays v. Norton, 48 Ill. 100; Turner v. Kerr, 44 Mo. 427; Phillips v. Hulsizer, 20 N. J. Eq. 308; Hoffman v. Ryan, 21 W. Va. 415; Davis v. Brewster, 59 Tex. 93; Hanlon v. Doherty (Ind.), 9 N. E. Rep. 782; Robinson v. Lincoln Sav. Bank (Tenn.), 35 S. W. Rep. 656. In determining whether a deed absolute on its face, or an instrument in the form of a conditional sale is a mortgage, great weight is attached to these circumstances: that the alleged price was greatly inadequate; that the vendor remained in possession of the property; and that there had been pending negotiations for a loan. These facts may be proved by parol, as also the relation of debtor and creditor. Davis v. Demming, 12 W. Va. 246. The fact that parties, after the execution of an absolute deed still understood that the relation of creditor and debtor continued, in respect to the debt on which the deed was founded, must generally be regarded as decisive in showing that the instrument was intended to be a mortgage. Rudd v. Van Orden, 33 N. J. Eq. 113.

[1] Ga. Code, 1882, § 3809; Spence v. Steadman, 49 Ga. 133; N. H. Gen. Laws, 1878, ch. 136, § 2.

[2] Peugh v. Davis, 96 U. S. 332; Klein v. McNamara, 54 Miss. 90; Snavely v. Pickle, 29 Grati. 27; Montgomery v. Speet, 55 Cal. 352; Darst v. Murphy (Ill.), 9 N. E. Rep. 887; Herron v. Herron, 91 Ind. 278; Landers v. Beck, 92 Ind. 49; Stephens v. Allen, 11 Oreg. 188; Nesbitt v.

to the ground upon which this power is exercised, and upon what evidence, there is considerable diversity; and while, as a general rule, such evidence is only admissible in courts of equity, in some of the States it is admissible at law as well.[1] In some of the States any evidence going to show the intention of the parties is admissible to show the character of the instrument, while in others it is held that such evidence only as tends to show fraud, accident, mistake, or trust, will be permitted. The theory upon which the former class of adjudications at first proceeded, was "that the fact of a deed being given as security determines its character, and not the evidence of the fact. Also, that parol evidence that a deed is a mortgage is not heard in contradiction of the deed, but in explanation of the transaction to prevent the perpetration of fraud by the mortgagee." [2] The more modern doctrine, however, is, that a security in this form is

Cavender (S. C.), 2 S. E. Rep. 702; First Nat. Bank v. Ashmead (Fla.), 2 South. Rep. 657. Although parol evidence may not be admissible to prove a deed a mortgage as against a subsequent purchaser for value without notice, it is admissible against the original grantee, and for the purpose of compelling him to allow the grantor to redeem. Hills v. Loomis, 42 Vt. 562. The proofs to establish a deed as a mortgage must be clear, consistent and convincing. Phillips v. Croft, 42 Ala. 477; Kent v. Lasley, 24 Wis. 654; Low v. Graff, 80 Ill. 360; Price v. Karnes, 59 Ill. 276; Butler v. Butler, 46 Wis. 430; Hancock v. Harper, 86 Ill. 445; Pierce v. Traver, 13 Nev. 526; Whitsett v. Kershaw, 4 Col. 419; Clark v. Finlon, 90 Ill. 245; Magnusson v. Johnson, 73 Ill. 156; Cadman v. Peter, 118 U. S. 73; Lance's Appeal, 112 Pa. St. 456; Pancake v. Cauffman, 114 Pa. St. 113; McCormick v. Herndon (Wis.), 31 N. W. Rep. 303; Miller v. Yturria (Tex.), 7 S. W. Rep. 206; Satterfield v. Malone, 35 Fed. Rep. 445. Only on purely equitable grounds will a deed absolute in form be declared to be a mortgage. Thus, a voluntary conveyance, made to one creditor in order to defraud the grantor's other creditors, will not be deemed an equitable mortgage by proof of a subsequent oral agreement that the grantee shall re-convey on payment of the amount due him. Hassam v. Barrett, 115 Mass. 256.

[1] Tillson v. Moulton, 23 Ill. 648; Wilcox v. Bates, 26 Wis. 465; De France v. De France, 34 Pa. St. 385; Carter v. Carter, 5 Tex. 93; Moreland v. Barnhart, 44 Tex. 275. The burden of proof to show an absolute deed to have been intended as a mortgage is upon the grantor. Haines v. Thompson, 70 Pa. St. 434.

[2] Chaires v. Brady, 10 Fla. 133.

so calculated to be an instrument of fraud and oppression as to constitute a *quasi* fraud in itself; and consequently the mere fact that an absolute deed was intended as a security affords jurisdiction to a court of equity to interfere and give relief on the common ground of fraud.[1] This is practically the doctrine recognized in the United States courts, and in Arkansas, California, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin.[2] In some of these States the right to redeem appears to be placed upon the ground that it would be a fraud on the part of the grantee to hold as his own what he acquired merely as security,[3] and that a court of equity will provide relief by declaring the grantee a trustee for the person defrauded.[4] In all of them, however, the right of redemption is declared to exist, and hence the distinction is of very little importance.[5]

[1] The fraud or fault which renders such evidence admissible is in the original transaction, rather than in the grantee's subsequent conduct in relation to it. Campbell v. Dearborn, 109 Mass. 130; Russell v. Southard, 12 How. 189. And see Sanders v. Stewart, 7 Nev. 200.

[2] Russell v. Southard, 12 How. (U. S.) 139; Anthony v. Anthony, 23 Ark. 479; Pierce v. Robinson, 13 Cal. 116; Sutphen v. Cushman, 35 Ill. 186; Low v. Graff, 80 Ill. 360; Moore v. Wade, 8 Kan. 380; Carr v. Carr, 52 N. Y. 251; Campbell v. Dearborn, 109 Mass. 130; Emerson v. Atwater, 7 Mich. 12; Wilson v. Patrick, 31 Iowa, 362; Weide v. Gehl, 21 Minn. 449; Freeman v. Wilson, 51 Miss. 329; Church v. Cole, 36 Ind. 34; Schade v. Bessinger, 3 Neb. 140; Cushman v. Stone, 69 Ill. 516; Cookes v. Culbertson, 9 Nev. 199; Shubert v. Stanley, 52 Ind. 46; Sweet v. Parker, 22 N. J. Eq. 453; Gibbs v. Penny, 13 Tex. 560; Horn v. Ketaltas, 46 N. Y. 605; Davis v. Demming, 12 W. Va. 246; Kerr v. Gilmore, 6 Watts, 405; Ruggles v. Williams, 1 Head (Tenn.), 141; Bird v. Wilkinson, 4 Leigh (Va.), 266; Klinck v. Price, 4 W. Va. 4. And see Villa v. Rodriguez, 12 Wall. 323; Odenbaugh v. Bradford, 67 Pa. St. 96. And see Jones on Mortgages, 4th ed., § 321.

[3] Roberts v. McMahan, 4 Green (Iowa), 34; O'Neil v. Capelle, 62 Mo. 202; Wright v. Bates, 13 Vt. 348; Moreland v. Barnhart, 44 Tex. 275; Conwell v. Evill, 4 Blackf. (Ind.) 67.

[4] Moreland v. Barnhart, 44 Tex. 275; Richardson v. Woodbury, 43 Me. 206; Cotterell v. Long, 20 Ohio, 464.

[5] Thomas on Mortgages, 12.

In a few of the States, before parol evidence can be introduced for the purpose of converting an absolute deed into a mortgage, some ground for equitable interference must first be shown, such as fraud, accident or mistake. It is assumed from the adjudications that this is the law in Alabama, Connecticut, Kentucky, Maryland, North Carolina, Rhode Island and South Carolina.[1] The adjudications on this subject are very numerous; our effort has been simply to select a representative case from each of the States. The reader can find the cases all collected and reviewed at some length in Jones on Mortgages.[2]

§ 417. **Whether a Conveyance be a Mortgage or a Conditional Sale**, depends rather upon the particular circumstances of each case, than upon any general rule of distinction.[3] The only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction.[4] Although conditional sales between debtor and creditor are scanned with jealousy, and in doubtful cases are always construed to be mortgages rather than conditional sales,[5] yet, when fairly made and clearly estab-

[1] Phillips v. Croft, 42 Ala. 477; Bryan v. Cowart, 21 Ala. 92; Collins v. Tillou, 26 Conn. 368; Washburn v. Merrill, 1 Day, 139; Blanchard v. Kenton, 4 Bibb (Ky.), 451; Kelly v. Bryan, 6 Ired. (N. C.) Eq. 283; Taylor v. Luther, 2 Sumn. (R. I.) 228; Arnold v. Mattison, 3 Rich. (S. C.) Eq. 153; Bank of Westminster v. Whyte, 1 Md. Ch. 536.

[2] §§ 282-342. See also 2 Washb. on Real Prop., 4th ed., 50, 51.

[3] An absolute conveyance and a separate agreement to re-convey, existing simultaneously and as parts of one transaction, may or may not constitute a mortgage, and equity is not concluded by the form, but will have regard to the actual facts. The test is the existence or non-existence of a debt. If after the transaction no debt remains, there is no mortgage, but only a conditional sale. McNamara v. Culver, 22 Kan 661. And see Voss v. Eller, 109 Ind. 260.

[4] Cornell v. Hall, 22 Mich. 377. See King v. Newman, 2 Munf. (Va.) 40; Crane v. Bonnell, 2 N. J. Eq. 264; Ketchum v. Johnson, 4 *Id.* 370; Robertson v. Campbell, 2 Call (Va.), 421; Ford v. Irwin, 18 Cal. 117; Morrison v. Brand, 5 Daly, 40.

[5] McNeill v. Norsworthy, 39 Ala. 156; Turnipseed v. Cunningham, 16 Ala. 501; Honore v. Hutchings, 8 Bush, 687; Trucks v. Lindsey, 18 Iowa, 504; Heath v. Willliams, 30 Ind. 495; Cornell v. Hall, 23 Mich.

lished, they will be upheld and enforced.[1] Under such a deed the vendor can only recover his property by complying precisely with the deed.[2] The principal test to be applied to such an instrument depends upon the inquiry, whether the relation of debtor and creditor is created, or, in case of a pre-existing debt, remains, and a debt still subsists between the parties. In that case, the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage.[3] On the other hand where the debt forming the consideration for the conveyance is extinguished at the time, by the express agreement of the parties, or the money advanced is not paid by way of a loan, so as to constitute a debt and liability to pay it, then it must be regarded as purchase-money, and the transaction will be a conditional sale, which the grantor can defeat only by a purchase or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a conveyance of the property.[4]

377; Pioneer Gold Mine Co. v. Baker, 23 Fed. Rep. 258; Rapier v. Gulf City Paper Co., 77 Ala. 126. Such a transaction is closely observed by courts in order to prevent the creditor from depriving the debtor of the right of redemption, which should attach to it as a mortgage. It is, moreover, suspicious for the reason that it easily affords a ready cloak for usury. It will not, therefore, be sustained as a conditional sale, unless it clearly appears that it was intended as such. Gleason v. Burke, 20 N. J. Eq. 300.

[1] Holmes v. Grant, 8 Paige, 243; Cooper v. Whitney, 3 Hill, 95; Pennington v. Hanby, 4 Munf. 140; Davis v. Thomas, 1 Russ. & Myl. 506; Conway v. Alexander, 7 Cranch, 218; Horbach v. Hill, 112 U. S., 144.

[2] Saxton v. Hitchcock, 47 Barb. 220; Woodworth v. Morris, 56 *Id.* 97.

[3] Wells v. Morrow, 38 Ala. 125; McNamara v. Culver, 22 Kan. 661; Daubenspeck v. Platt, 22 Cal. 330; Lodge v. Turman, 24 Cal. 385; Tibeau v. Tibeau, 22 Mo. 77; Alstin v. Cundiff, 52 Tex. 453; Hopkins v. Stephenson, 1 J. J. Marsh. (Ky.) 341; Murphy v. Calley, 1 Allen, 107. A court of equity will often pronounce that to be an equitable mortgage, which, at law, would be considered as a conditional sale; and if a conveyance resolves itself into a security for the performance or non-performance of an act, it is a mortgage, whatever be its form. Flagg v. Mann, 2 Sumn. 486; Pearson v. Seay, 38 Ala. 643; Dougherty v. McColgan, 6 Gill & J. (Md.) 275.

[4] Robinson v. Cropsey, 6 Paige (N. Y.) Ch. 143; Galt v. Jackson, 9 Ga. 151; Slowey v. McMurray, 27 Mo. 113; Hoopes v. Baily, 28 Miss.

In determining whether an instrument is a mortgage or a conditional sale, if the intention is not clear, the circumstances attending may be given in evidence, and such facts as adequacy of price paid,[1] want of obligation to repay the purchase-money,[2] or the continued possession of the grantor,[3] and like circumstances will be considered.[4] It is to be remembered that the intent that the transfer shall operate as a security must enter into the original contract. It is a maxim of equity, as we have seen, that "once a mortgage, always a mortgage." It is no less true that an absolute and unqualified conveyance cannot become a mortgage by subsequent agreement.[5] Subsequent admissions

328; West v. Hendrix, 28 Ala. 226; Hillhouse v. Dunning, 7 Conn. 143; Pitts v. Cable, 44 Ill. 103; French v. Sturdivant, 8 Me. 246; Glover v. Payne, 19 Wend. 518; Fuller v. Pratt, 10 Me. 197; Baxter v. Willey, 9 Vt. 276; Hubby v. Harris (Tex.), 3 S. W. Rep. 558. No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt, or the performance of a duty, either existing at the time of execution, or to be created or arise in future. But is is not necessary that the debt or duty should be evidenced in a separate written security. Brant v. Robertson, 16 Mo. 129. A deed absolute in form should not be treated as a mortgage, unless there was an indebtedness on the part of the grantor to the grantee, existing before the deed was made and intended to be secured thereby. A conveyance between parties who do not stand in the relation of debtor and creditor, made upon a stipulation that the grantor may re-purchase, is a conditial sale—not a mortgage. Slutz v. Desenberg, 28 Ohio St. 371. Where a deed and a written contract were simultaneously executed, in reference to real estate, and the evidence on the trial showed a pre-existing debt, it was held that if there was a continuing obligation for the debt, the transaction was a mortgage, although the deeds expressly stated that the debt was fully satisfied and that the contract was intended as a conditional sale, and not as a mortgage. Ruffier v. Womack, 30 Tex. 332. And see Haynie v. Robertson, 58 Ala. 37.

[1] Campbell v. Dearborn, 109 Mass. 130; Freeman v. Wilson, 51 Miss. 329; Russell v. Southard, 12 How. 139; Brown v. Dewey, 2 Barb. 28.

[2] "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." Conway v. Alexander, 7 Cranch, 219.

[3] Gibson v. Eller, 13 Ind. 124.

[4] See Davis v. Deming, 12 W. Va. 246.

[5] Sturtevant v. Sturtevant, 20 N. Y. 39; Barrett v. Carter, 3 Lans. 68.

that a deed was originally intended as a security may, however, be admitted in evidence.

ARTICLE II.

A CLASSIFICATION OF THE DIFFERENT KINDS OF MORTGAGES.

SECTION.

419. The plan of the present chapter.
420. Mortgages are divided into two general classes.
421. What are legal mortgages.
422. The common-law form of a mortgage.
423. Mortgages with power of sale.
424. Deeds of trust in the nature of mortgages.
425. Equitable mortgages defined.
426. Mortgages by deposit of title deeds.
427. Vendor's lien for purchase-money.

§ 419. **The Plan of the Present Chapter.**—Following the plan heretofore adopted in respect to purchase deeds, having said thus much, we shall next give a brief description of the various kinds of mortgages, after which we will proceed with the formal parts of an ordinary mortgage, premising that these will be found to embrace the more important features of all forms of mortgages.

§ 420. **Mortgages Divided into Two General Classes.**—In the first place mortgages may be classed as either legal or equitable. The design of the present article is to point out the distinction between these two general classes of mortgages, and to notice briefly the distinguishing features of the several kinds of mortgages belonging to each class.

§ 421. **What are Legal Mortgages.**—A legal mortgage, as distinguished from an equitable mortgage, may be said to be a contract specifically entered into and executed with the formalities required by law, by which property is con-

veyed as a security for the performance of some act. Of these there are three forms in common and ordinary use, which may be described as the common-law form, power of sale mortgages, and deeds of trust in the nature of mortgages, each of which will be noticed in the order named.

§ 422. **The Common-Law Form of a Mortgage** consists simply of a conveyance with a defeasance; and may be made, as we have seen, either by an absolute deed, and a defeasance back, or by a single conditional deed. The former mode is rarely adopted in the United States, and has been regarded unfavorably by the courts in England, as indicating fraud, and injurious to the mortgagor, because the defeasance might be lost, and an absolute title set up.[1]

The principal feature to be noted in respect to the common-law form of mortgage is that it contains no stipulation for a sale of the premises in case of default in the payment of the money, and consequently can only be foreclosed by entry and possession, or by an equitable suit for foreclosure. This was the only form of mortgage in common use until a comparatively recent period.

§ 423. **Power of Sale Mortgages.**—Great inconvenience having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose, the conveyancers ingeniously devised a method of contracting by which the mortgagee might, after a given time, procure his principal and interest by a sale of the mortgaged premises, without being under the necessity of applying to a court of equity. This is called a power of sale mortgage. It differs from the common-law form only in the addition of an agreement between the parties, that if the money is not paid when it becomes due, the mortgagee may in a certain number of days thereafter, and with such precautions to secure a fair price as may be agreed upon, sell the land and apply the proceeds, after defraying the expenses of the trust, to the payment of the mortgage debt, and then pay over the resi-

[1] Cotterell v. Purchase, Cas. Temp. Talb. 64; Baker v. Wind, 1 Ves. 161.

due to the mortgagor or his legal representatives. Doubts were for a long time entertained as to the validity of these powers of sale; but all such doubts are now removed, and their use, both in mortgages and deeds of trust, is becoming general.[1] In several of the States they are almost universally adopted to the exclusion of every other form of mortage. But whether a power of sale is a usual incident to a mortgage in the sense that it is to be considered as included, under an authority to mortgage, unless specially excluded, may be regarded as an open question in many of the States. In England, it is held that power of sale is an incident to a power to mortgage; that authority to make a mortgage means that a mortgage may contain what mortgages in general contain, and therefore that it may contain a power of sale.[2] The same doctrine has been held in New York,[3] and would probably be adhered to wherever a power of sale is a usual accompaniment to a mortgage.

A power of sale in a mortgage is in the nature of a simple power of attorney to convey land, the incidents of which have been considered in a former chapter, to which the reader is referred.[4]

§ 424. **Deeds of Trust in the Nature of Mortgages.**— The distinction is well settled between an absolute deed of trust and a deed of trust in the nature of a mortgage. The former, for the trust purposes, is unconditional and indefeasible, while the latter is conditional and defeasible, and is, in legal effect, a mortgage.[5] The only important difference between a deed of trust to secure a debt and a mortgage, is that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for

[1] Kinsley v. Ames, 2 Metc. 29; Lydson v. Powell, 101 Mass. 77; Longwith v. Butler, 8 Ill. 74; Turner v. Johnson, 10 Ohio, 204; Brisbane v. Stoughton, 17 Ohio, 482; Mitchell v. Bogan, 11 Rich. (S. C.) 686; Hyman v. Devereux, 63 N. C. 624.

[2] *In re* Chawner's Will, L. R. 8 Eq. 569. See Bridges v. Longman, 24 Beav. 27; Cruikshank v. Duffin, L. R. 13 Eq. 555.

[3] Wilson v. Troup, 7 Johns Ch. 25.

[4] *Ante*, Chap. III., Art. VI.

[5] Hoffmann v. Mackall, 5 Ohio St. 124.

his benefit. The right to redeem is the same in either case. Says Mr. Chief Justice Walker, of Arkansas: "The attributes of a deed of trust for such purposes and a mortgage with power of sale, are the same. Both are intended as securities, and in a legal sense are mortgages. In both, the legal title passes from the grantor; but in equity he is, before foreclosure, considered the actual owner in both, and as broadly in one as the other, the grantor has the right to redeem; in other words, the equity of redemption, which can only be barred by a valid execution of the power."[1] The only difference of opinion on the subject seems to have arisen in those States in which a mortgage is regarded as a mere lien, as to whether a deed of trust shall be regarded as vesting a legal estate in the trustee. But in those States also a deed of trust has generally been held to have the same effect only as a mortage.[2]

§ 425. **Equitable Mortgages Defined.**—There is a large class of securities which are subject to the principles upon which the ordinary rules of redemption and foreclosure are founded, but in which those rules, from the nature of the contract, are somewhat modified, which are called equitable mortgages. They are liens upon the real estate of such a character that they are recognized in equity as securities for the payment of money, and are treated as mortgages. The term is sometimes applied to mortgages of the equity of redemption of property, the legal interest whereof has been already mortgaged, and also to mortgages of property acquired after the execution of the mortgage.[3] Mortgages of this kind may be properly called "mortgages of an equity;" but the term "equitable mortgage" applies more properly to the kind of contract which equity establishes as a lien, and thus embraces those transactions in which property or the evidence of property comes into the hands of

[1] Turner v. Watkins, 31 Ark. 429.

[2] Lenox v. Reed, 12 Kan. 223; Newman v. Samuels, 17 Iowa, 528; Webb v. Hoselton, 4 Neb. 308. But see Soutter v. Miller, 15 Fla. 625.

[3] Coe v. The Columbus, etc., 10 Ohio St. 391.

the creditor, upon a written or verbal, express or implied agreement, that such property shall be answerable for the debt, as well as those transactions in which the intention or duty of creating a charge on property is held to arise from an express or implied contract to render that property liable.[1] It will thus be seen that the kinds of equitable mortgages are as various as there are modes of contracting for a security upon land. Nor is it essential that the contract should be in express terms a security; for equity will often imply this from the nature of the transaction between the parties.[2] Among the instruments of this character that have been treated as equitable mortgages, may be mentioned assignments of contracts of purchase,[3] conveyances in consideration of the support and maintenance of the grantor,[4] an agreement to give a mortgage, not objectionable for want of consideration,[5] the lien of a vendor under a written contract of reservation,[6] absolute conveyances with defeasance resting in parol,[7] informal and de-

[1] Fisher on Mortgages, 51.

[2] Jones on Mortgages, § 162.

[3] Fitzhugh v. Smith, 62 Ill. 486; Smith v. Cremer, 71 Ill. 185. Where the vendee having a bond for title only, transfers such bond to his securities for payment of the purchase-money, this constitutes an equitable mortgage in favor of the securities, which may be foreclosed. Hays v. Hall, 4 Port. (Ala.) 374. The delivery of a contract for the purchase of land, without any written assignment, constitutes an equitable mortgage. Allen v. Woodruff, 96 Ill. 11. A covenant by a debtor with his creditor to purchase certain lands and then mortgage them to him, will be enforced in a court of equity by a decree of sale as an equitable mortgage. Wright v. Shumway, 1 Biss. 23. And see Carr v. Rising, 62 Ill. 14.

[4] Chase v. Peck, 21 N. Y. 581; Gilson v. Gilson, 2 Allen, 115.

[5] Chase v. Peck, 21 N. Y. 581; Bank v. Carpenter, 7 Ohio, 21; Burdick v. Jackson, 14 N. Y. Sup. Ct. 188; Carter v. Holman, 60 Mo. 498.

[6] Davis v. Hamilton, 50 Miss. 213; Peeples v. Stolla, 57 Ala. 53; Caldwell v. Fraim, 32 Tex. 310. Something more than a reservation of a right to re-purchase or a covenant to re-convey must be shown in order to convert a deed absolute on its face into a mortgage. A mortgage is a security for the performance of some agreement, usually to pay a sum of money, and such must be shown by affirmative evidence to warrant the courts in treating an absolute deed as a mortgage. Henley v. Hotaling, 41 Cal. 22.

[7] *Ante*, § 416.

fectively executed mortages generally.[1] But the two classes of securities which may be considered as pre-eminently entitled to be called equitable mortgages, and which are ordinarily classed under that head, are those which arise by implication of law, in apparent conflict with the Statute of Frauds, without any written agreement of the parties. These are next to be considered.

§ 426. **The Deposit of Title Deeds** as a security for a debt, amounts in England and some of the United States to an equitable mortgage:[2] and in England the possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security, and that agreement will be carried into execution in equity against the mortgagor, or any who claim under him, with notice, either actual or constructive, of such deposit having been made.[3] The doctrine is not adapted to the policy of our laws in this country, and has seldom been resorted to, owing, for the most part, to the difficulty of affecting a subsequent purchaser or incumbrancer with notice of such deposit.[4] But the power of creating a lien by the deposit of title deeds has been expressly recognized in several of the States, among which are California, Georgia, Illinois, Maine, Mississippi, New Jersey, New

[1] Daggett v. Rankin, 31 Cal. 321; Gale v. Morris, 29 N. J. Eq. 222; Burnside v. Wyman, 49 Mo. 356; Payne v. Wilson, 74 N. Y. 348. A deed of trust otherwise complete, but not containing the name of the trustee, will be enforced in equity as an equitable mortgage. McQuie v. Peay, 58 Mo. 56. So. where a seal is omitted, or the mortgage is not expressed to be sealed. Dunn v. Raley, 58 Mo. 134; Harrington v. Fortner, 58 Mo. 468; McClurg v. Phillips, 49 Mo. 315; Jones v. Brewington, 58 Mo. 210; Springfield Savings Bank v. Society, 127 Mass. 516; Van Riswick v. Goodhue, 50 Md. 57. So where the acknowledgment is wanting. Gill v. Clark, 54 Mo. 415; Black v. Gregg, 58 Mo. 565.

[2] See 14 Cent. L. J. 426; 15 *Id.* 46.

[3] Bac. Abr., Tit. Mortgage, p. 32; Adams' Eq. 123.

[4] Meador v. Meador, 3 Heisk. (Tenn.) 562. Says Mr. Washburn: "It is not easy to see why such a doctrine should prevail in a country where the system of registration is universal, and where it must be carried out, if at all, in direct violence to the Statute of Frauds." 2 Washb. on Real Prop., 4th ed., 84.

York, South Carolina and Wisconsin.[1] But the doctrine, it is believed, is generally rejected in this country, so far, at least, as it sustains a mortgage upon a verbal or implied promise in connection with the deposit of the deeds.[2] A written agreement accompanying the deeds will make the transaction a mortgage;[3] and such an agreement without the deposit of the deeds may amount to an equitable mortgage.

§ 427. **Vendor's Lien for Purchase-Money.**—Another form of lien which is recognized and enforced in equity is that allowed the vendor of land for the purchase-money. The vendee becomes a trustee to the vendor for the purchase-money, or so much as remains unpaid, which constitutes an equitable mortgage. The principle is founded in natural equity, it is said, and seems to be inherent in the English equity jurisprudence.[4] But in this country the doctrine, even in those States in which it has been adopted, has frequently been criticized as inconsistent with the general policy of our registry laws,[5] and in many of the States has been rejected. The doctrine does not prevail in Connecticut, Georgia, Kansas, Maine, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia and West Virginia.[6] It

[1] Hill v. Eldred, 49 Cal. 398; Mounce v. Byars, 16 Ga. 469; Wilson v. Lyon, 51 Ill. 166; Hall v. McDuff, 24 Me. 311; Williams v. Stratton, 10 Smed. & M. 418; Robinson v. Urquhart, 12 N. J. Eq. 523; Griffin v. Griffin, 18 N. J. Eq. 104; Chase v. Peck, 21 N. Y. 584; Rockwell v. Hobby, 2 Sandf. Ch. 9; Welch v. Usher, 2 Hill Ch. 167; Jarvis v. Dutcher, 16 Wis. 307; Hutzler v. Phillips (S. C.), 1 S. E. Rep. 502.

[2] In Ohio, no equitable lien upon land arises from the deposit of title deeds, even though accompanied with a parol declaration that the deposit was made as a security. Probasco v. Johnson, 2 Disney, 96. In a later case, Judge Dillon held that the mere deposit of title deeds, without more equity, will not create an equitable mortgage. First National Bank v. Caldwell, 4 Dillon, 314.

[3] Edwards v. Trumbull, 50 Pa. St. 509; Luch's Appeal, 44 Pa. St. 519.

[4] 4 Kent's Com. 152; Chapman v. Tanner, 1 Vern. 267; Blackburn v. Gregson, 1 Bro. Ch. 420; Mackreth v. Symmons, 15 Ves. 329.

[5] Conover v. Warren, 6 Ill. 498; Bayley v. Greenleaf, 7 Wheat. 46; Pierson v. David, 1 Iowa, 23; Porter v. City of Dubuque, 20 Iowa, 440.

[6] Atwood v. Vincent, 17 Conn. 575; Jones v. Janes, 56 Ga. 325; Smith v. Rowland, 13 Kan. 245; Gilman v. Brown, 1 Mason, 192; Phil-

has been adopted in Alabama, Arkansas, California, Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas and Wisconsin.[1] When the lien shall be deemed to exist, and when waived or postponed to another equity, are questions upon which the cases are in irreconcilable conflict. They appear to be governed and controlled by no well settled rules, but on the contrary the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case.[2] An analysis of the doctrine as it exists in the different States will not, therefore, be attempted. It may be stated, however, in a general way, that the lien takes effect against the vendee, his heirs and privies in estate, and against subsequent purchasers who have notice that the purchase-money remains unpaid. It does not prevail against *bona fide* purchasers and mortgagees without

brook v. Delano, 29 Me. 410; Ahrend v. Odiorne, 118 Mass. 261; Arlin v. Brown, 44 N. H. 102; Cameron v. Mason, 7 Ired. Eq. 180; Stephens' Appeal, 38 Pa. St. 9; Perry v. Grant, 10 R. I. 334; Wragg v. Compt. Gen., 2 Desau. 509; Gen. Stat., Vt. 1862, ch. 65, § 33; Code, Va., 1873, ch. 115, § 1; Code, W. Va., 1870, ch. 75, § 1.

[1] Burns v. Taylor, 23 Ala. 255; Bradford v. Harper, 25 Ala. 337; English v. Russell, Hempstead, 35; Shall v. Biscoe, 18 Ark. 142; Harris v. Hanks, 25 Ark. 510; Truebody v. Jacobson, 2 Cal. 269; Gallagher v. Mars, 50 Cal. 23; Civil Code, Cal., 1872, § 3046; Francis v. Wells, 2 Col. 660; Ford v. Smith, 1 McAr. 592; Bradford v. Marvin, 2 Fla. 463; Trustees v. Wright, 11 Ill. 603; Wing v. Goodman, 75 Ill. 159; Markoe v. Andras, 67 Ill. 34; Moshier v. Meek, 80 Ill. 79; McCarty v. Pruet, 4 Ind. 226; Yaryan v. Shriner, 26 Ind. 364; Pierson v. David, 1 Iowa, 23; Rev. Stat. Iowa, 1873, § 1940; Muir v. Cross, 10 B. Mon. 277; Gen. Stat. Ky., 1873, p. 589; Carr v. Hobbs, 11 Md. 285; Sears v. Smith, 2 Mich. 243; Payne v. Avery, 21 Mich. 524; Duke v. Balme, 16 Minn. 306; Trotter v. Erwin, 27 Miss. 772; Pitts v. Parker, 44 Miss. 247; Marsh v. Turner, 4 Mo. 253; Pratt v. Clark, 57 Mo. 189; Vandoren v. Todd, 3 N. J. Eq. 397; Corlies v. Howland, 26 N. J. Eq. 311; Stafford v. Van Rensselaer, 9 Cow. 316; Chase v. Peck, 21 N. Y. 581; Williams v. Roberts, 5 Ohio, 35; Anketel v. Converse, 17 Ohio St. 11; Pease v. Kelly, 3 Oreg. 417; Ross v. Whitson, 6 Yerg. 50; Pinchain v. Collard, 13 Tex. 333; Brown v. Christie, 27 Tex. 73; Willard v. Reas, 26 Wis. 540.

[2] Fisk v. Potter, 2 Abb. (N. Y.) App. Dec. 138.

notice;[1] nor, as a general rule, against creditors of the purchaser. But upon this question there is a diversity of opinion.[2] The acceptance of a distinct and separate security for the purchase-money, such as a mortgage of other property,[3] or personal security,[4] is a waiver of the lien, unless this presumption is rebutted by satisfactory evidence that it was intended that the vendor should retain his lien.[5]

ARTICLE III.

FORM GENERALLY.

SECTION.

429. No particular form necessary.
430. Statutory forms.
431. The clauses of an ordinary mortgage.

§ 429. **No Particular Form of Words is Necessary** to constitute a mortgage, if it can be made to appear that the transfer was by way of security.[6] There must appear a present purpose of the mortgagor to pledge his land for the payment of a sum of money or for the performance of some act.[7] It may be in the form of a conveyance upon condition, as at common law, or of a grant with a covenant

[1] Adams v. Buchanan, 49 Mo. 64; Houston v. Stanton, 11 Ala. 412; Moshier v. Meek, 80 Ill. 79; Clark v. Hunt, 3 J. J. Marsh. 553; Blight v. Banks, 6 B. Mon. 198. But see Truebody v. Jacobson, 2 Cal. 269.

[2] Bayley v. Greenleaf, 7 Wheat. 46; Taylor v. Baldwin, 10 Barb. 626; Aldridge v. Duan, 7 Blackf. 249. See Repp v. Repp, 12 Gill & J. 341; Brown v. Vanlier, 7 Humph. 239.

[3] Richardson v. Ridgely, 8 Gill & J. 87; Young v. Wood, 11 B. Mon. 123.

[4] Boon v. Murphy, 6 Blackf. 272; Mayham v. Coombs, 14 Ohio, 428; McGonigal v. Plummer, 30 Md. 422.

[5] Baum v. Grigsby, 21 Cal. 175; Campbell v. Baldwin, 2 Humph. 248; Fonda v. Jones, 42 Miss. 792.

[6] Jones on Mortgages, 4th ed., § 60.

[7] New Orleans Banking Assoc. v. Adams, 109 U. S. 211.

to re-convey, or a conveyance upon express trust.[1] And where two instruments taken together describe the property and the amount of indebtedness, and convey the premises as security for the indebtedness, this is a sufficient mortgage.[2] The words "we mortgage the property," accompanied by a provision for the sale of it upon non-payment of money, recited in the instrument as being thus secured, are sufficient to create a mortgage.[3]

§ 430. **Statutory Forms.**—Forms for mortgages and deeds of trust in the nature of mortgages, have been prescribed by statute in several of the States;[4] but as statutory forms for purchase deeds have not been considered mandatory, in like manner those for mortgages have been treated rather as declaratory, that such form shall be deemed good and effectual.[5] All that is essential to a good deed or mortgage may be expressed in a very few words. "But," as remarked by Chancellor Kent, "persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests, that to make 'assurance doubly sure,' generally, in important cases, the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance for a conveyance surrounded by the usual outworks, and securing respect and checking attacks by the formality of its manner, the prolixity of its provisions and the usual redundancy of its language."[6]

[1] Woodworth v. Guzman, 1 Cal. 203; Baldwin v. Jenkins, 23 Miss. 206; Peterson v. Clark, 15 John. 205.

[2] Peterson v. Clark, 15 Johns. 205; Brown v. Dean, 3 Wend. 208; Roosevelt v. Heirs of Fulton, 7 Cow. 71; Dickenson v. Jackson, 6 Cow. 147; Woodworth v. Guzman, 1 Cal. 203; Baldwin v. Jenkins, 23 Miss. 206. Conveyance and defeasance executed at same time and as parts of the same transaction, though upon different pieces of paper, constitute in law but one instrument and that a mortgage. Bunker v. Barron, 79 Me. 62; Manufacturers Bank v. Bank of Penn., 42 Amer. Dec. 246.

[3] DeLeon v. Higuera, 15 Cal. 483.

[4] See Stimson's Amer. Stat. §§ 1484, 1485.

[5] See *ante*, § 60.

[6] Kent's Com. 461.

§ 431. **The Clauses Ordinarily Contained in a Formal Mortgage.**—Although the mortgages in use in different parts of the country differ very considerably in form, they yet have certain constituent elements in common, which will be considered in the order following: 1. The granting part. 2. The defeasance. 3. Special stipulations. 4. The power of sale.

ARTICLE IV.

THE GRANTING PART OF A MORTGAGE.

SECTION.

434. How far the rules governing purchase deeds apply.
435. The recital of the indebtedness, and the covenant for payment.
436. The consideration named in a mortgage.
437. The granting clause.
438. The description of the premises.
439. The habendum.

§ 434. **How far the Rules Governing Purchase Deeds Apply to Mortgages.**—A mortgage, as we have seen, consists of a conveyance, with a defeasance. Generally speaking, whatever is requisite to an absolute conveyance of land, is requisite also to a conveyance by way of mortgage; and whatever would be sufficient as a grant of the land, would be sufficient for the granting part of a mortgage. It will not be necessary, therefore, to go over the whole subject of the form and requisites of the granting part of a mortgage, as that usually corresponds to the premises of a deed, which subject has heretofore been considered. Only such clauses or rules governing the same will be noticed, as are varied by the nature of the transaction. In respect to the date of the instrument, the names and description of the parties, and recitals, the same general rules apply as in case of purchase deeds, to which head the reader is referred.[1]

[1] Chap. II., Articles II, III, and IV.

§ 435. **Recital of the Indebtedness and Covenant for its Payment.**—In some of the States, it is usual to insert in this part of a mortgage a recital of the indebtedness to be secured, and a covenant for its payment. This clause, as often as it is contained in a mortgage, is properly inserted next after the names and description of the parties, and is usually named as a part of the consideration. A nominal consideration, in addition to the indebtedness, is ordinarily mentioned, apparently for the purpose of supporting the conveyance as a bargain and sale; but, as will be noticed hereafter, this is not essential.[1] The advantage gained by inserting this covenant for the payment of the mortgage money is, that it makes the mortgagee a specialty creditor of the mortgagor. The mere recital of the consideration is not sufficient to create a personal liability on the part of the mortgagor by implication.[2] Consequently, when there is no express covenant to pay the debt secured, and no note, bond, or other separate obligation, the remedy of the mortgagee is confined to the land mortgaged.[3] The absence of any bond or covenant to pay the money will not, however, make the instrument less effectual as a mortgage.[4]

§. 436. **The Consideration Named in a Mortgage.**—When a recital of the indebtedness is omitted, the actual amount of the debt is usually named as the consideration of the mortgage deed. But this is not essential; nor is it important that any consideration be named.[5] The seal imports a consideration. The debt secured is the real consideration which supports a mortgage, but that is described in the

[1] *Infra*, § 436.

[2] Shafer v. Bear River, etc. Mining Co., 4 Cal. 294; Henry v. Bell, 5 Vt. 393; Coleman v. Van Rensselaer, 44 How. Pr. 368. Though the statement be "that this grant is intended as security for the payment of five hundred dollars and interest," no admission of an indebtedness creating a personal liability is implied. Severance v. Griffith, 2 Lans. (N. Y.) 38.

[3] Van Brunt v. Mismer, 8 Minn. 232.

[4] 4 Kent's Com. 145.

[5] 2 Kent's Com. 465.

condition, and the amount is neither fixed nor controlled by the nominal consideration mentioned in the premises of the grant.[1]

§ 437. **The Granting Clause** corresponds to the operative part of a purchase deed, and contains the words which convey the mortgaged property, by grant or by demise or assignment, according as it is freehold or leasehold, to the mortgagee, his heirs and assigns, or to him, his executors, administrators and assigns.[2]

§ 438. **In Respect to the Description of the Premises,** the same general rules apply as in case of purchase deeds. Any description which affords sufficient means of identifying the land intended, will be sufficient to sustain the lien of a mortgage.[3] It is, of course, of the greatest importance, as affecting the value of the security, that the premises be accurately described. But the fact that the description of the property is so indefinite as not to pass any title, will afford no objection to the enforcement of the mortgage against the mortgagor personally.[4]

Where no rule of law is infringed and the rights of third persons are not prejudiced, courts of equity will, in proper causes, give effect to the mortgages of subsequently acquired property.[5] Thus it has frequently been held that a mortgage upon an existing railroad may be extended to rolling stock to be subsequently acquired, if an intent to acquire such stock and to hold it subject to the mort-

[1] Keyes v. Bump (Vt.), 9 Atl. Rep. 598. And see Nazro v. Ware (Minn.), 38 N. W. Rep. 359.

[2] Dean's Prin. Conv. 387. See *ante*, §§ 82–85.

[3] *Ante*, § 87, *et seq.*; English v. Roche, 6 Ind. 62; Blakemore v. Taber, 22 Ind. 466; Tucker v. Field, 51 Miss. 191; Hancock v. Watson, 18 Cal. 137; Morse v. Dewey, 3 N. H. 535; Baker v. Bank of Louisiana, 2 La. Ann. 371; Bowen v. Wood, 35 Ind. 268. And see Simmons v. Fuller, 17 Minn. 485; Teetshorn v. Hull, 30 Wis. 162.

[4] Whitney v. Buckman, 13 Cal. 536. The unintentional misstatement in a mortgage of the number of the city lot upon which it is given, does not invalidate it. Mervin v. Murphy, 35 Tex. 787.

[5] Beall v. White, 94 U. S. 382; Everman v. Robb, 52 Miss. 653.

gage is sufficiently expressed.[1] But a mortgage of after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires.[2] It has also been held that additions of a permanent character, by way of improvements, on mortgaged premises, made by the owner or mortgagor, are regarded as a part of the mortgaged estate, and may be sold with it.[3]

The rules for determining what fixtures are covered by a mortgage are much the same as apply between vendors and purchasers. If there be any difference, it is in the greater favor extended to a mortgagee in the application of the rules of construction. In general, therefore, a mortgage of land covers all fixtures belonging to the realty without any mention of them.[4] But, as pointed out by Mr. Dean, where the mortgage is of a limited interest in the land, the case may be different. Where a limited owner has placed fixtures upon the land, with a right to remove them, he is possessed of two separate and distinct interests—"a lim-

[1] Morrill v. Noyes, 56 Me. 458; Quincy v. C., B. & Q. R. R. 94 Ill. 537; Pierce v. Milwaukee, etc., 24 Wis. 551; New Orleans Canal Co. v. Montgomery, 95 U. S. 16. But see Randolph v. New Jersey West Line R. R. Co., 28 N. J. Eq. 49. But after-acquired lands, not used in connection with the actual operations of a railroad, cannot pass under a general mortgage of the railroad itself, as a part thereof, under the doctrine of accretions. Calhoun v. Paducah R. R., 9 Cent. L. J. 66. So a mortgage upon an unplanted crop may be enforced in equity, when the crop matures. Apperson v. Moore, 30 Ark. 56; Arques v. Wasson, 51 Cal. 620; Booker v. Jones, 55 Ala. 266; Jarratt v. McDaniel, 32 Ark. 598; Bell v. Radcliff, 32 Ark. 645.

[2] Williamson v. New Jersey Southern R. R. Co., 28 N. J. Eq. 277; *Id.* 29 N. J. Eq. 311.

[3] Wood v. Wheeler, 93 Ill. 153.

[4] *Ante*, § 94. And see Southbridge Sav. Bank v. Mason (Mass.), 18 N. E. Rep. 406. The fact that a mortgage enumerates some fixtures, but does not enumerate others, affords reason for supposing that these were intentionally omitted and did not pass. Trappes v. Harter, 2 Cromp. & Mees. 153, 177.

ited interest in the land, an absolute interest in the fixtures." These last have, therefore, in such a case, a separate existence apart from the freehold, and although they will pass without being specially mentioned on an assignment of the whole of a limited interest,[1] because the person who has annexed them has, by the assignment, parted with his right of removal, which will therefore be assumed to have been passed to the transferee. The case is different where the limited interest is not entirely parted with, as, for instance, where there is a mortgage by sublease; for here the fixtures do not pass unless specifically mentioned,[2] and the right to remove them will remain, therefore, in the mortgagor. We see then that, as against the mortgagor, the mortgagee acquires a right to the fixtures, although not named, if the mortgage is by way of grant of a fee-simple or assignment of the whole of a limited interest, but that they must be definitely mentioned in order to pass, on a mortgage by demise." [3] Fixtures, except when their ownership accompanies the fee, being mere chattels, can only be legally mortgaged by complying with the statutory requirements in respect to chattel mortgages.

§ 439. **The Office of the Habendum**, as we have seen, is to define the estate conveyed.[4] In a mortgage it limits the mortgagee's estate according to the nature of the mortgaged premises, and subject to the condition of defeasance which immediately follows, and is next to be considered.

[1] *Ex parte* Reynal, 2 Mont. Dea. & DeG., 443.
[2] Hawtry v. Butlin, L. R. 8 Q. B. 290, 293.
[3] Dean's Pr. Conv. 388.
[4] *Ante*, § 111, *et seq.*

ARTICLE V.

THE DEFEASANCE.

SECTION.

442. The usual form of the condition.
443. The debt secured.
444. The description of the debt.
445. The time of payment.

§ 442. **The Usual Form of the Condition.**[1]—The condition of defeasance usually describes the debt secured, and provides that if the mortgagor or those claiming under him shall pay the same to the mortgagee, his executors, administrators or assigns, "then this deed shall be void." Sometimes the stipulation is that, "then the said mortgagee will reconvey the property herein described, to the mortgagor, his heirs or assigns." It does not appear that the wording in this respect is of essential importance, provided it is apparent from the whole instrument that it was intended as a security. The substance, and not the form, of the expression is chiefly to be regarded; and an enlarged and liberal view is to be taken of the instrument, in order to ascertain and carry into effect the intention of the parties.[2] But a deed whose proviso does not contain the ordinary words, "then this deed shall be void," or some equivalent expression whereby it appears upon what event the deed is to be-

[1] See *Ante*, § 53.

[2] Steel v. Steel, 4 Allen, 417. In this case the court says in reference to the mortgage in question: "For although the proviso is inartificially and imperfectly expressed, it is yet impossible to entertain any doubt as to the real meaning and intention of the parties in the insertion of it in the deed. It clearly imports that the conveyance is made upon a condition upon which the future and continued validity of the deed is to depend; and therefore it necessarily follows that the parties intended, either that it should be valid and continue in force if the condition should be performed, or that in that contingency it should become inoperative and void." And see Lanfair v. Lanfair, 18 Pick. 299; Skinner v. Cox, 4 Dev. (N. C.) L. 59.

come void, or that it is to become void in some event, is inoperative as a mortgage.[1] Though it is not requisite that the condition of a mortgage should be so completely certain as to preclude extraneous inquiry.[2]

§ 443. **The Debt Secured.**—We have already seen that a debt or obligation of some sort is essential to a mortgage.[3] The instrument, being in its nature a security, cannot, of course, become effective as such, unless there is something to be secured by it.[4] But while no conveyance can be a mortgage unless made for the purpose of securing the payment of a debt, or the performance of a duty, either existing at the time of its execution or to be created or arise in the future, it is not essential that there should be any personal liability for the payment or performance of such obligation.[5] Nor is it necessary that the debt or duty should be evidenced by any separate written security.[6] The validity of a mortgage depends rather upon the existence of the debt than upon the form of the indebtedness.[7] Like every other contract, it must be founded upon a sufficient consideration, and in this respect is governed, for the most part, by the same rules that apply to any contract.[8] Consequently, any bene-

[1] Adams v. Stevens, 49 Me. 362; Goddard v. Coe, 55 Me. 385.

[2] Youngs v. Wilson, 27 N. Y. 351. And the fact of the trust of the surplus being declared in a separate and unregistered paper will not vitiate it as a security for the recited debt. Skinner v. Cox, 4 Dev. (N. C.) L. 59. The defeasance may, instead of a mortgage, be a declaration of trust. Vance v. Lincoln, 38 Cal. 586.

[3] *Ante*, § 436.

[4] Snavely v. Pickle, 29 Gratt 27. See Endel v. Walls, 16 Fla. 786.

[5] Hickox v. Lowe, 10 Cal. 197; Hodgdon v. Shannon, 44 N. H. 572. In such case the remedy of the mortgagee is confined to the land alone. Weed v. Covill, 14 Barb. (N. Y.) 242.

[6] Brant v. Robertson, 16 Mo. 129; Carnall v. Duval, 22 Ark. 136; Brookings v. White, 49 Me. 479; Eacho v. Cosby, 26 Gratt. (Va.) 112.

[7] Hodgdon v. Shannon, 44 N. H. 572; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Griffin v. Cranston, 1 Bosw. (N. Y.) 281.

[8] In general the same defenses may be made to an action on a mortgage, the statute of limitations excepted, that may be made to an action on the debt. Atwood v. Fisk, 101 Mass. 363; Vinton v. King, 4 Allen (Mass.), 562; Bush v. Cooper, 26 Miss. 599. A pre-existing debt is a good consideration for a mortgage. Moore v. Fuller, 6 Oreg. 272.

fit to the mortgagor or to a stranger, or damage or loss to the mortgagee, rendered or sustained at the request of the mortgagor,[1] or a liability to loss or damage on the part of the mortgagee, is a sufficient consideration to sustain a mortgage.[2] But a mortgage for a fixed sum, founded upon no consideration except an undertaking to furnish goods, which were never furnished, cannot be enforced, except in the hands of a *bona fide* purchaser for value.[3] And where a mortgage is made for the purpose of raising money by subsequent negotiation, it has no validity until it is transferred to some one for value.[4] So where the contract is one that is prohibited as immoral or against public policy, the mortgage cannot be enforced.[5] But if a mortgage given for an illegal consideration has been foreclosed out of court, the land cannot be recovered by the mortgagor—unless the law be such that the illegal consideration, when paid, can be recovered back, not merely in money but in land.[6] As a general rule courts will neither enforce such contracts, nor lend their aid to recover money paid upon them. When the parties are equally at fault, the law leaves them exactly where they stand. Both parties are left without remedy, and they must settle their own questions in such cases with-

[1] Magruder v. State Bank, 18 Ark. 9; Hayden v. Buddensick, 4 Hun (N. Y.), 649.

[2] Simpson v. Robert, 35 Ga. 180.

[3] Fisher v. Meister, 24 Mich. 447. A mortgage given for future credit is valid only to the extent of the advances actually made upon it, and cannot be enforced for a different purpose. Mizner v. Russell, 29 Mich. 229; McDowell v. Fisher, 25 N. J. Eq. 93.

[4] And it is then subject to any incumbrance that may have intervened before the negotiation of it. Schafer v. Reilly, 50 N. Y. 61; Mullison's Estate, 68 Pa. St. 212.

[5] McLaughlin v. Cosgrove, 99 Mass. 4. And this, whether it consists in the violation of the common law or of a statute. Gilbert v Holmes, 64 Ill. 548. Thus it has been held that a mortgage, given to secure a note which was in fact made in consideration of Confederate notes, cannot be enforced. Seuseneau v. Saloy, 21 La. Ann. 305. And see Gilbert v. Holmes, 64 Ill. 548; Henderson v. Palmer, 71 Ill. 579; Patterson v. Donner, 48 Cal. 369; Peed v. McKee, 42 Iowa, 689.

[6] McLaughlin v. Cosgrove, 99 Mass. 4. See Jackson v. Dominick, 14 Johns. 435; Bissell v. Kellogg, 60 Barb. 617.

out the aid of courts.[1] But sometimes contracts are prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess over him. In such case the parties are not regarded as being equally guilty, and so the rule is not deemed applicable, though both have violated the law. Such a contract may be void as to one of the parties and valid as to the other.[2]

A mortgage may also be void in part and valid in part, where a part of the old consideration is illegal and a part is not. When the one can be separated from the other, the mortgage may be enforced for such part as was free from the taint of illegality.[3] A mortgage once paid cannot, by parol, be made effectual as security for new liabilities.[4] Though it has been held that a mortgage, which has been satisfied and delivered up to the mortgagor without being cancelled, may be again delivered, and thus become a valid security for another purpose, except as against intervening interests.[5]

The parties to a mortgage, given to secure a specific sum, cannot, as against the intervening rights of others, extend the mortgage to cover other debts;[6] nor a higher rate of

[1] Atwood v. Fisk, 101 Mass. 363; James v. Roberts, 18 Ohio, 548.

[2] Deming v. State, 23 Ind. 416.

[3] Weeden v. Hawes, 10 Conn. 50; Feldman v. Gamble, 26 N. J. Eq. 494; Johnson v. Richardson, 38 N. H. 353; Rood v. Winslow, 2 Doug. (Mich.) 68; Leeds v. Cameron, 3 Sumn. 488. See Atwood v. Fisk, 101 Mass. 363. Although the statute makes such an obligation void, a court of equity will require the complainant to do equity by paying or tendering payment of the valid notes covered by the mortage, before it will entertain a suit to cause the mortgage to be delivered up to be cancelled as a cloud upon title. Williams v. Fitzhugh, 37 N. Y. 444.

[4] Mead v. York, 6 N. Y. 449; Johnson v. Anderson, 30 Ark. 745. Yet if such agreement has been made, and money advanced by the mortgagee to the mortgagor, upon the strength of it, the court will not aid the mortgagor, or any one claiming under him, with notice, to cause the mortgage to be cancelled or released until such additional advances shall have been repaid. Joslyn v. Wyman, 5 Allen, 62.

[5] Underhill v. Atwater, 22 N. J. Eq. 16.

[6] Stoddard v. Hart, 23 N. Y. 556; Van Wagner v. Van Wagner, 7 N. J. Eq. 27; Schiffer v. Feagin, 51 Ala. 335. And see Townsend v. Empire Stone Dressing Co., 6 Duer, 208; Johnson v. Anderson, 30 Ark. 745; Thurman v. Jenkins, 58 Tenn. 426.

interest.[1] Neither can a mortgage be extended by implication to secure any other obligation than that expressly mentioned.[2] Though a party, dealing with the equity of redemption, takes it subject to a reasonable construction being placed upon the mortgage. A change in the form of the indebtedness, as by the renewal of the original note of the mortgagor, does not effect the security.[3] A mortgage, intended to secure a certain debt is valid in equity for that purpose, whatever form the debt may assume, if it can be traced.[4]

An indorsement upon the mortgage, executed, acknowledged and recorded with the usual formalities of deeds, has been allowed to have the effect, as between the parties and subsequent incumbrancers, of extending the condition of the mortgage to secure a further sum.[5] But the mortgagee cannot tack to his mortgage any debt not secured thereby, except it be one occasioned by the default of the mortgagor, and require its payment as a condition to the right to redeem.[6] The English doctrine of tacking does not apply to this country.[7] Yet the rule that the mortgage debt cannot, as against parties in interest, be increased

[1] Gardner v. Emerson, 40 Ill. 296; Burchard v. Frazer, 23 Mich. 224. The maker of a mortgage cannot, as against a third person owning the equity of redemption, increase the charge upon the land by confessing a judgment, and thus compounding the interest. McGready v. McGready, 17 Mo. 597. But as between the parties, an agreement to increase the rate of interest is valid, forbearance being implied as the consideration. Haggerty v. Allaire Works, 5 Sandf. (N. Y.) 230.

[2] Schadel v. St. Martin, 11 La. Ann. 175; Beardsley v. Tuttle, 11 Wis. 74.

[3] Burdett v. Clay, 8 B. Mon. (Ky.) 287; Bank of South Carolina v. Rose, 1 Strobh. Eq., 257; Enston v. Friday, 2 Rich. (S. C.) 427; Callard v. Matthews, 10 La. Ann. 233. But a mortgage, given by one to secure the payment, at maturity, of notes executed by another, is no security for renewal notes substituted therefor. Ayres v. Wattson, 57 Pa. St. 360.

[4] Patterson v. Johnson, 7 Ohio, 225. And see Gault v. McGrath, 32 Pa. St. 392; Bobbitt v. Flowers, 1 Swan (Tenn.), 511.

[5] Choteau v. Thompson, 2 Ohio St. 114.

[6] 1 Jones on Mortgages, § 360.

[7] 4 Kent's Com. 178.

after the execution of the mortgage, is subject to the qualification that money paid by the mortgagee to redeem the premises from tax sale, or any charge which is a paramount lien upon the property, becomes a part of the mortgage debt, and may be enforced by foreclosure.[1]

Interest, both before and after maturity, is recoverable by virtue of the contract as an incident or part of the debt.[2] A mortgage may also be made to secure the payment of a reasonable attorney's fee, in case of a foreclosure, and such a provision is included in the lien of the mortgage as much as the debt itself.[3] So also all costs and expenses, necessa-

[1] Burr v. Veeder, 3 Wend. 412; Faure v. Winans, Hopk. (N. Y.) 283; Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631; Brevoort v. Randolph, 7 How. Pr. 398; Kortright v. Cady, 23 Barb. 490; Mix v. Hotchkiss, 14 Conn. 32; Wright v. Langley, 36 Ill. 381; Silver Lake Bank v. North, 4 Johns. Ch. 307; Arnold v. Foot, 7 B. Mon. 66.

[2] Brannon v. Hursell, 112 Mass. 63. The exaction of usurious interest does not invalidate the mortgage given to secure the payment of the debt, nor impair the right of the mortgagee to sell the mortgaged premises under a power in the mortgage. The court will, in distributing the proceeds, adjust the question of interest. Powell v. Hopkins, 38 Md. 1.

[3] Rice v. Cribb, 12 Wis. 179; Mosher v. Chapin, *Id.* 452; Jones v. Schulmeyer, 39 Ind. 119; Munter v. Linn, 61 Ala. 492; Hitchcock v. Merrick, 15 Wis. 522; Pierce v. Kneeland, 16 Wis. 672; Maus v. McKellip, 38 Md. 231; Sharp v. Barker, 11 Kan. 381; Nelson v. Everett, 29 Iowa, 184; Clawson v. Munson, 55 Ill. 394; Bronson v. LaCrosse R. R. Co., 2 Wall. 283. Such a stipulation is not usurious. Walsh v. Ætna Life Ins. Co., 30 Iowa, 133. But held against public policy in Kentucky. Thomasson v. Townsend, 10 Bush, 114; Rilling v. Thompson, 12 Bush, 310. Where a mortgage deed empowered the mortgagee in the usual manner to sell, rendering the surplus money to the mortgagor, "after deducting the costs of sale, and also $100 as an attorney fee, should any proceedings be taken to foreclose this indenture," it was held that such fee could not be recovered upon foreclosure in equity. Sage v. Riggs, 12 Mich. 313. A stipulation for five per cent. as fees to the attorney for collection, is not to be regarded as imposing a penalty; it merely gives compensation to the mortgagee for expense incurred, owing to the mortgagor's default. Robinson v. Loomis, 51 Pa. St. 78. But where it was shown that the suit for the collection of the note was unnecessary, it was held that the fees could not be secured by the creditor. Alexandrie v. Saloy, 14 La. Ann. 327. And see Foote v. Sprague, 13 Kan. 155. The Supreme Court of Missouri has held that the obligation for the payment of money, containing a stipulation for payment of attorneys' fee renders it non-negotiable. First Nat. Bank v. Marlow 71 Mo. 618; Storr v. Wakefield, *Id.* 622.

rily incurred in enforcing the mortage.[1] In like manner the parties may, by their original agreement, provide for future advances or liabilities, and when made, such future advances will be covered by the lien of the mortgage.[2] Says Chancellor Kent: "The principle is, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of a *bona fide* junior incumbrancer; but a mortgage is always good to secure future loans, when there is no intervening equity."[3] The rights of a holder of such a mortgage, as against subsequent purchasers and incumbrancers, have been the subject of much discussion and seeming conflict of opinion. The general rule appears to be that where the mortgagee has notice of later incumbrances upon the property, such later incumbrances will take precedence as to all advances made after such notice.[4] But some courts have held that where the mortgagee was by his contract with the mortgagor bound to make the advances intended to be secured by the mortgage, he would take precedence of inter-

[1] Hurd v. Coleman, 42 Me. 182; Rawson v. Hall, 56 Me. 142. A court of equity, where a mortgage authorizes the payment of the expenses of the mortgagee, may pay, out of funds in his hands, the taxed costs, and also such counsel fees in behalf of the complainants as, in the discretion of the court, it may seem right to allow. Bronson v. LaCrosse R. R. Co., 2 Wall. 283.

[2] Jarrett v. McDaniel, 32 Ark. 598; Lovelace v. Webb, 62 Ala. 271. In Maryland and New Hampshire the sum secured is required by statute to be set out in the mortgage. Gen. Stat. N. H. p. 253, ch. 122, §§ 2, 3; Pub. Lien Laws, Md. 1860, art. 64, § 2.

[3] 4 Kent Com. 175. And see Sillers v. Lester, 48 Miss. 513; Stevens v. Buffalo, etc. R. R. Co., 45 How. Pr. 104.

[4] Spader v. Lawler, 17 Ohio, 371; Frye v. Bank of Illinois, 11 Ill. 367. As to whether the constructive notice, given by registration of such junior mortgage will affect the prior mortgage, see Jones on Mortgages, § 372, and cases cited. Even if the intent to secure future advances is not disclosed by the terms of the instrument, yet if the mortgage is recorded and states a specific sum which it is intended to secure, so as to apprise third persons of the extent of the lien which may be claimed under it, it is good for subsequent advances except as against persons acquiring equities prior to the time when such advances are made. Summers v. Roos, 42 Miss. 749; D'Meza v. Generes, 22 La. Ann. 285. And see Farnum v. Burnett, 21 N. J. Eq. 87; Moore v. Ragland, 74 N. C. 343.

mediate incumbrances.[1] So a mortgage of indemnity to a surety is a lien from the time of its execution and delivery, if the liability has been incurred, or there is a legal obligation to incur the liability.[2]

Whether unliquidated damages can, under any circumstances, become a proper subject for a mortgage security, has been questioned.[3] But courts generally treat as mortgages conveyances conditioned for the performance of any duty, a breach of which can be compensated by an award of damages.[4] Of this character, as a general rule, are deeds conditional for the support and maintenance of the mortgagee, or of a third person.[5] Though, when such an instrument is spoken of as a mortgage, it must undoubtedly be taken in a qualified sense, as being subject to certain incidents which do not, ordinarily, attach to mortgages. Thus, where a father made a conveyance of a farm to his son, and at the same time took a mortgage to himself and wife, with a condition by which the son and his heirs, executors and administrators, were to provide for the maintenance of his parents during their lives, it was held that it was to be inferred, as a necessary implication, nothing appearing to the contrary, that the mortgagees were not to enter until the condition was broken or waste done, and that the duty to provide for the maintenance of the parents is, under such circumstances, a personal duty of the son, which he

[1] Boswell v. Woodwin, 31 Conn. 74; Cox v. Hoxie, 115 Mass. 120; Brinkmeyer v. Browneller, 55 Ind. 487. Where there is no obligation on the part of the mortgagee and such advances or liabilities are merely optional with him, if he make such advances or incur such liabilities with notice that the mortgaged property has been purchased or unincumbered by another, the latter is not bound by such mortgage. *Ibid.*

[2] Taylor v. Cornelius, 60 Pa. St. 187. And takes precedence of a subsequent incumbrance, executed before the mortgagee has paid the debt, so as to become entitled to enforce the mortgage. Watson v. Dickens, 12 Smed. & M. 608.

[3] Bethlehem v. Annis, 40 N. H. 34.

[4] 2 Greenl. Cruise on Real Prop. 80 n. It rests in the sound discretion of a court, whether a forfeiture shall be relieved by treating the instrument as a mortgage. Henry v. Tupper, 29 Vt. 358.

[5] Austin v. Austin, 9 Vt. 420.

cannot transfer to third persons and substitute them in his stead, without the consent of the parents; and if he fails to superintend the fulfillment of it, that will be a breach of the condition.[1] So, where a mortgage was made under similar circumstances, the court said: "It will not do to apply to it the principles which are in force as to an ordinary mortgage for the payment of money. There, when the object of the security is accomplished, it is at an end. It never could have been the intention of the parties to these instruments that, if James failed to perform his covenants, which were the sole consideration of the grant to him, and the old man, in consequence of his breach, by legal proceedings or otherwise, retook possession, after his death the title should revest in James. That would be no security that James would perform his covenants, but an inducement to him to break them."[2] It may be added that as between mortgagor and mortgagee and their privies, a mortgage to secure an antecedent or pre-existing debt, or a debt subsequently to be contracted, is perfectly valid, whatever may be its effect as to subsequent purchasers or incumbrancers.[3]

§ 444. **The Description of the Debt.**—Literal exactness in describing the indebtedness is not required in a mortgage security; it suffices if the description be correct as far as it goes, and full enough to direct attention to the source of correct and full information, without danger that the language used will deceive or mislead parties.[4]

[1] Flanders v. Lamphear, 9 N. H. 201; Bryant v. Erskine, 55 Me. 153.

[2] Soper v. Guernsey, 71 Pa. St. 224. Sharswood, J., in this case observes that: "It is not an uncommon arrangement for a father to make a conveyance of his farm to one of his sons in consideration of being supported, nursed, and attended during his life. The wisdom of such a contract is very questionable, even where the most entire confidence is felt at the time in the affection of the child. * * * One of the evil consequences, which seems almost invariably to attach itself to such arrangements, is the distressing family discord and lawsuits which spring from them. Many of them have been brought to this court. It is not always easy to administer justice in such cases in conformity to law."

[3] Steiner v. McCall, 61 Ala. 406.

[4] Ricketson v. Richardson, 19 Cal. 330; Booth v. Barnum, 9 Conn. 286; Sheafe v. Gerry, 18 N. H. 245; Horman v. Deming, 44 Conn. 124.

The first point to be noticed is that the description should be correct as far as it goes. In other words, the debt must come fairly within the terms used. It is enough if it be described with reasonable certainty:[1] but where there is a total variance between the debt and the mortgage, the latter will be void for uncertainty.[2] For example, where a mortgage was conditioned to pay "the just and full sum which the maker might owe the mortgagee either as maker or indorser of any notes, bills, bonds, checks, overdrafts, or securities of any kind, given by him, according to the conditions of any such writing obligatory executed by him to the mortgagee as collateral security," it was held that the instrument called for written evidences of debt, signed by the mortgagor, and could not be made available as a security for a debt not in writing.[3] So where a mortgage, correctly describing other debts, mentioned "a note or notes of S. for about $350," it was held that the recital could not be construed to include six notes of S., amounting to over $1,500; nor would the words "an account for about $50," include amounts exceeding $900.[4] But it is not required that the mortgage shall set out a literal copy of the instrument secured thereby. It is sufficient if it be described according to its legal effect.[5] In general, a mortgage is is not invalid on account of uncertainty in the description of the debt intended to be secured, when, upon the ordinary principles allowing extrinsic evidence to apply a written contract to its proper subject-matter, the debt intended to be secured may be shown;[6] parol evidence is admissible to identify the note as the one referred to in the

[1] Pearce v. Hall, 12 Bush. 209.

[2] And parol evidence is inadmissible in an action at law. Follett v. Heath, 15 Wis. 601.

[3] Walker v. Paine, 31 Barb. 213; Bramhall v. Flood, 41 Conn. 68. And see Doyle v. White, 26 Me. 341.

[4] Storms v. Storms, 3 Bush. 77.

[5] Aull v. Lee, 61 Mo. 160; Heywood v. Wingate, 14 N. H. 73; Pitcher v. Barrows, 17 Pick. 361.

[6] Gill v. Pinney, 12 Ohio St. 38; Tousley v. Tousley, 5 Ohio St. 78; Hurd v. Robinson, 11 Ohio St. 232.

mortgage.[1] Where the condition of the mortgage stated that the grantor was indebted to the grantee for moneys loaned, and his liability on divers bills of exchange and promissory notes, and provided that if he discharged them within six months the deed should be void, it was held to be a sufficient description of the debt, since it was capable of being made certain by parol evidence.[2] For the same reason, a mistake in describing the debt does not invalidate the security.[3] The part that is incorrect in the description may be rejected, when enough remains to identify the note or thing to be done, as set forth in the condition.[4] When sufficient facts are stated to identify the debt with reasonable certainty, it is immaterial that some particulars of the description do not correspond precisely with the instrument produced; it may yet be admitted as sufficiently identified by the description in the mortgage.[5] But if the instrument produced agrees with the instrument in some respects and varies in others, proof that it is the obligation intended to be secured may be required before it can be introduced in evidence as such.[6]

In the next place it is to be remembered that the description must be full enough to direct attention to the source of correct and full information, without danger that the language used will deceive or mislead parties. It is not essential, as we have seen, that the mortgage should contain a specific description of the debt intended to be secured. Any description, which will put those interested upon in-

[1] Melvin v. Fellows, 33 N. H. 401; Prescott v. Hayes, 43 N. H. 593.

[2] Pitcher v. Barrows, 17 Pick. 361. The material question is, whether a debt still exists, which the mortgage was executed to secure. Aull v. Lee, 61 Mo. 160.

[3] Porter v. Smith, 13 Vt. 492; Tousley v. Tousley, 5 Ohio St. 78.

[4] Gilman v. Moody, 43 N. H. 239.

[5] Paine v. Benton, 32 Wis. 491. The correspondence of date, amount, parties, rate of interest and maturity, coupled with possession of the note, raises a presumption of identity, throwing on the mortgagor the burden of showing another note of like description. Jones v. Elliott, 4 La. Ann. 303.

[6] Robertson v. Stark, 15 N. H. 112.

quiry, will be sufficient.[1] The nature and amount of indebtedness secured may even be expressed in terms so general, that subsequent purchasers and attaching creditors must look beyond the deed, to ascertain both the existence and amount of the debt.[2] Thus, a mortgage to secure all existing debts, without specifying them, was held not to be invalid for want of certainty in the amount secured.[3] So a condition to pay "all sums that the mortgagee may become liable to pay by signing or otherwise," is not too indefinite, and includes any legal liability incurred.[4] But when a mortgage is given to secure an ascertained debt, it is always desirable that the amount of the debt should be stated; and in some of the States, a failure to specify the amount has been held to invalidate the security as against subsequent incumbrances.[5] But where the amount of the debt may be ascertained by reference to another deed or instrument, and it is so recited in the mortgage, it will be sufficient, and is enough to put subsequent purchasers upon inquiry.[6]

In drawing mortgages, care should be taken that the description of the debt and rate of interest shall not be such as to mislead purchasers as to the amount secured: although, as against the mortgagor and one claiming under him with notice, the note referred to in the mortgage is competent evidence to explain and fix the amount of the debt;[7] but as against a *bona fide* purchaser without notice, the lien of the mortgage cannot be extended by such evi-

[1] Hurd v. Robinson, 11 Ohio St. 232.

[2] Gibson v. Seymour, 4 Vt. 518.

[3] Michigan Ins. Co. v. Brown, 11 Mich. 265.

[4] Soule v. Albee, 31 Vt. 142.

[5] Pearce v. Hall, 12 Bush, 209. See Stoughton v. Pasco, 5 Conn. 442; Pettibone v. Griswold, 4 Conn. 158; Shepard v. Shepard, 6 Conn. 37.

[6] Kellogg v. Frazier, 40 Iowa, 502; Somersworth Savings Bank v. Roberts, 38 N. H. 23; Jones on Mortgages, § 344, citing Pike v. Collins, 33 Me. 38. Where the note put in evidence does not correspond with its description in the mortgage, the former controls and cures the defective description. Cleavenger v. Beath, 53 Ind. 172.

[7] Somersworth Savings Bank v. Roberts, 38 N. H. 26; Bassett v. Bas-

dence, beyond what is expressed upon its face. A mortgage to secure furture advances should give all requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record and by common prudence and ordinary diligence, ascertain the extent of the incumbrance.[1] Some of the cases seem to require that a limit shall be fixed, to which such advances may reach; but it is generally held to be sufficient, that the mortgage indicates the source of full information as to the state of the incumbrance. To secure priority, however, such a mortgage should either be taken for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured, or should specifically mention the sums thereafter to be advanced.[2]

§ 445. **The Time of Payment of the Debt** or performance of the duty, secured by the mortgage, should be stated, in order that it may be known with certainty when a breach of the condition occurs. If no time is stated, under the general rules of construction the debt is due on demand, and the mortgage may be enforced at once.[3] When the time of payment is fixed in the mortgage, the mortgagor is not entitled to other notice.[4] It is to be remembered, however, that the maker of a note, which is payable by instalments, at future times certain, with interest, is entitled to grace both on principal and interest; and the condition of a mortgage given to secure such a debt is not broken until the expiration of the grace which is allowed upon the note.[5] When no time is specified for the payment of interest, and no circumstance exists indicating a different time, the pre-

sett, 10 N. H. 70; Boody v. Davis, 20 N. H. 140; Crafts v. Crafts, 13 Gray, 360. The mere fact that the mortgage recites a greater indebtedness than actually existed at the time of its execution, is not conclusive of fraud. Bell v. Prewitt, 62 Ill. 361.

[1] Witczinski v. Everman, 51 Miss. 841.

[2] *Ante*, § 443. And see Washb. on Real. Prop., 4th ed., 151, 152; Jones on Mortgages, § 364, *et seq.*; Summers v. Roos, 42 Miss. 749.

[3] Carnell v. Duval, 22 Ark. 136; Brookings v. White, 49 Me. 479.

[4] Ing v. Cromwell, 4 Md. 31.

[5] Coffin v. Loring, 5 Allen (Mass.), 153.

sumption is that it is payable at the same time as the debt. But where the language was such as to indicate that some periodical payment was intended, it was held that this was sufficient to put a purchaser upon inquiry, and that parol evidence was admissible to prove when payments were intended to be made.[1]

A failure to pay any instalment, either of interest or principal, constitutes a default, under the meaning of a condition which authorizes a sale upon the happening of any default, and the mortgagee may thereupon enter and take possession, or may maintain an action to foreclose.[2] But unless the mortgage so provides, the proceeds of a sale cannot, in general, be applied to the payment of any sum not then due; though it is not necessary that there should be an express or formal agreement to that effect, in order to authorize the mortgagee to receive payment of the whole debt, and not merely what is due at the time of the sale, if it is not then all due. If it appears from the whole instrument that such was the intention, the sale may be made upon any default, and the proceeds applied to the whole debt, though a part of it is not yet due.[3] Where such is the intention, it is the usual and better practice, however, to insert a clause in power of sale mortgages, to the effect that upon any default the mortgagee may sell, and out of the money arising from the sale, retain all sums then secured by the mortgage, whether then or thereafter payable.[4] In

[1] Ackens v. Winston, 22 N. J. Eq. 444.

[2] Whitcher v. Webb, 44 Cal. 127; Estabrook v. Moulton, 9 Mass. 258; Cassidy v. Caton, 47 Iowa, 22; Stanhope v. Manners, 2 Eden, 197; West Branch Bank v. Chester, 11 Pa. St. 282; Goodman v. Cin. & Chicago R. R. Co., 2 Disney (Ohio), 176. But see Harshaw v. McKesson, 66 N. C. 266, where it was held that a court of equity will never decree a foreclosure until the period limited for payment has expired. See also Hough v. Doyle, 8 Blackf. 300.

[3] McLean v. Presley, 56 Ala. 211; Pope v. Durant, 26 Iowa, 233.

[4] Where the trustee in a deed of trust, given to secure the payment of certain notes, is empowered by the terms of the deed to sell all the trust property when the first note falls due, and all the notes are to be considered to be matured upon the first default for the purpose of the application of the trust fund, the notes not due upon the first default are

some of the States the stipulation more frequently assumes the form of an agreement that, upon default in the payment of any instalment of principal or interest, the whole sum shall become due and payable. It is now well settled that such an agreement is valid and binding, and, therefore, upon default in payment of any instalment the mortgagee may proceed for the whole debt remaining unpaid.[1] And this provision, though not mentioned in the note or bond, nevertheless forms a part of the agreement, since both instruments are to be construed together.[2] So resort may be had to the notes to ascertain when the payments are due.[3]

not to be considered as matured so that a personal judgment may be rendered on them. Mason v. Barnard, 36 Mo. 384. Nor will such a provision authorize a suit in equity to foreclose the mortgage as to the whole debt. Holden v. Gilbert, 7 Paige, 208.

[1] Ottawa Northern Plank Road Co. v. Murray, 15 Ill 336; Robinson v. Loomis, 51 Pa. St. 78; Mobray v. Leckie, 42 Md. 474; Stanclift v. Norton, 11 Kan. 218; Ferris v. Ferris, 28 Barb. 29; Rubens v. Prindle, 44 Barb. 336; Harper v. Ely, 56 Ill. 179; Jones v. Schulmeyer, 39 Ind. 119; Fisher v. Milmine, 94 Ill. 328. And courts of equity have no power to relieve against the default and its consequences, except for fraud or misconduct on the part of the mortgagee in procuring the default. Malcolm v. Allen, 49 N. Y. 448; Noyes v. Clark, 7 Paige, 179. The mortgagor cannot relieve the forfeiture by paying into court the interest or instalment on which it occurred. Bennett v. Stevenson, 53 N. Y. 508. The whole debt, or the interest only, may be enforced, at the creditor's election. Waples v. Jones, 62 Mo. 440. Though the acceptance of the interest would doubtless waive the default. Langridge v. Payne, 2 Johns. & Hemm. 423. But the unauthorized acceptance of the interest or instalment by an agent of the mortgagee would not have that effect. Sloat v. Bean, 47 Iowa, 60.

[2] Schoonmaker v. Taylor, 14 Wis. 313; Waples v. Jones, 62 Mo. 440; Noell v. Graves, 8 Cent. L. J. 353. And on the other hand where a deed of trust, given to secure sundry notes maturing at different dates, provided that none of them shall become due, and that the deed shall not be foreclosed till the maturity of the note made latest payable, the holder who purchases one of the notes with knowledge of the above provision cannot recover judgment thereon until the last note matures. Brownlee v. Arnold, 60 Mo. 79.

[3] Kennedy v. Ross, 25 Pa. St. 256; Harper v. Ely, 56 Ill. 179; Richards v. Holmes, 18 How. (U. S.) 143.

ARTICLE VI.

SPECIAL STIPULATIONS.

SECTION.

447. The subjects to be discussed under the present head.
448. Covenants for title.
449. The covenant for the payment of interest.
450. To keep the premises in repair.
451. For the payment of taxes.
452. To keep the premises insured.
453. Reservation of the right of possession to the mortgagor.
454. Of the right to perform the condition before the time limited.
455. Of the right to have a portion of the premises released.

§ 447. **The Subjects to be Discussed under the Present Head.**—Having gone through with the clauses and provissions ordinarily contained in a common-law mortgage, which includes all the legal requisites of a mortgage, we propose under this head to notice some of the stipulations commonly inserted for the purpose of amplifying, limiting or changing the contract to suit the convenience of the parties, or the circumstances of the particular case. Such stipulations are various and may be of any kind not inconsistent with the general rules of law. Those in most frequent use only will be noticed.

§ 448. **Covenants for Title.**—When covenants for title are inserted in a mortgage, they are usually the same, and have the same construction and effect as the covenants ordinarily contained in purchase deeds. Such covenants, as a general rule, are of little use in a mortgage, since the damages recoverable for a breach never exceed the amount due on the mortgage, and it is usually more convenient to sue for the debt than upon the covenants. In long time mortgages, however, covenants for title may become of importance upon a failure of title, in furnishing a remedy that may be enforced before the debt becomes due. The covenant of warranty is often of importance also in its effect of

working an estopped, whereby an after-acquired title inures to the benefit of the holder of the mortgage.[1]

It is to be remembered that in case of a mortgage given to secure purchase-money, the mortgagor really pledges nothing but the interest which he obtained under his vendor's deed, and cannot, therefore, be held responsible on his covenants for an imperfection existing in the title prior to such conveyance, either to his vendor or one who purchases at a foreclosure sale.[2] Nor is he estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenant's to himself.[3]

§ 449. **Covenant for the Payment of Interest.**—In English mortgages the proviso for the redemption is ordinarily followed by a covenant by the mortgagor that if the principal sum lent, or any part of it, shall remain unpaid after the day fixed for payment, he will, so long as it remains unpaid, pay interest on it at a specified rate.[4] In this country such a covenant is seldom inserted in a mortgage, since the law annexes interest as an invariable incident in all cases of default to pay the principal sum, when the debtor knows what the principal sum is and when he has to pay it.[5] The rate of interest and times of payment are usually fixed by the note or bond, and described with care in the condition of the mortgage, under which head the subject of interest has already been noticed. It is thought desirable, however, to add a few observations to what was there said, and no more eligible place is presented than the present. When the rate of interest is specified in the mortgage, the

[1] Cross v. Robinson, 21 Conn. 379. In some of the States one who grants a mortgage of the fee, will be estopped to set up an after-acquired title, though there be no warranty. Clark v. Baker, 14 Cal. 612; Kirkaldie v. Larrabee, 31 Cal. 455; Christy v. Dana, 34 Cal. 548; Amonett v. Amis, 16 La. Ann. 225.

[2] Geyer v. Girard, 22 Mo. 159; Haynes v. Stevens, 11 N. H. 28; Smith v. Cannell, 32 Me. 123; Brown v. Staples, 28 Me. 497.

[3] Connor v. Eddy, 25 Mo. 72.

[4] Dean's Prin. Conv. 392.

Spencer v. Pierce, 5 R. I. 63.

same rate continues after default as before. When the rate is not specified, but there is either an express or implied agreement to pay interest, the law fixes it at the legal rate.[1] After default the law annexes interest at the legal rate, even when the debt did not previously bear interest.[2]

Interest and usury laws apply to mortgages the same as to any other contract. Quite a diversity exists in the laws of the different States upon the subject; but we shall not attempt any detailed statement of such laws, for the reason that at the present time they are subject to such frequent changes, the tendency of legislation being to relax the former stringency in regard to usury. In several of the States the usury laws have been entirely abolished. A few general observations only will be offered upon this subject.

Whether a contract is usurious depends upon the intention of the parties, and the court will look into the whole transaction to determine what the intent was.[3] There must be a loan in contemplation of the parties, and if there be a loan, however disguised, the contract will be usurious, if it is so in other respects.[4] The *bona fide* sale of a note, bond, or other security at a greater discount than would amount to legal interest is not, *per se*, a loan, although the note may be indorsed by the seller and he remains responsible.[5] But if a note, bond, or security be made with a view to vade the laws of usury, and afterwards sold for a

[1] Ackens v. Winston, 22 N. J. Eq. 444.

[2] Spencer v. Pierce, 5 R. I. 63.

[3] Bank of U. S. v. Waggener, 9 Pet. 399; Stelle v. Andrews, 19 N. J. Eq. 109; Tyler on Usury, 103; Lloyd v. Scott, 4 Pet. 205; Jones v. Berryhill, 25 Iowa, 289; Condit v. Baldwin, 21 N. Y. 221. The agreement must be made with full consent and knowledge of the contracting parties. Marsh v. Martindale, 3 Bos. & P. 154. But aside from mistake or accident, evidence will not be allowed to show that the mortgagee did not intend to violate the statute. Fielder v. Darrin, 50 N. Y. 437.

[4] Fitzsimons v. Baum, 14 Pa. St. 32; Birdsall v. Patterson, 51 N. Y. 43; Nichols v. Fearson, 7 Pet. 109; Schermerhorn v. Talman, 14 N. Y. 93; Corcoran v. Powers, 6 Ohio St. 37; Pomeroy v. Ainsworth, 22 Barb. 119; Jordan v. Mitchell, 25 Ark. 258.

[5] Culver v. Bigelow, 43 Vt. 249; Nichols v. Fearson, 7 Pet. 109; Williams v. Reynolds, 10 Md. 57; Newman v. Williams, 29 Miss. 212.

less amount than the interest, the transaction will be considered a loan.[1] It is a general rule that a contract, which in its inception is unaffected by usury, can never be invalidated by any subsequent usurious transaction.[2] And on the other hand, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious.[3] The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury, and any valid and legitimate charge or expense will be upheld; but it must appear that the commissions are charged for other services, and are not merely a device to evade the law.[4] If the agent of the mortgagee, unknown to the latter, and without his authority, in making a loan exact a bonus to himself as a commission for making the loan, this will not constitute usury in the principal, nor affect the security in hands.[5]

[1] Vickery v. Dickson, 62 Barb. 272; Corcoran v. Powers, 6 Ohio St. 37; Bynum v. Rogers, 4 Jones (N. C.), 399. The question is largely one for the jury. Williams v. Reynolds, 10 Md. 57.

[2] Nichols v. Fearson, 7 Pet. 109; Williams v. Reynolds, 10 Md. 57. A parol promise by mortgagor, made after maturity of the mortgage, upon consideration to pay a higher rate of interest, is valid, but is not binding on persons purchasing parcels of the mortgaged premises before maturity. Burchard v. Frazer, 23 Mich. 224.

[3] Bell v. Lent, 24 Wend. 230; Vickery v. Dickson, 35 Barb. 96; McCraney v. Alden, 46 Barb. 272; Bridge v. Hubbard, 15 Mass. 96.

[4] Where a mortgage contains a stipulation that the mortgagor shall pay not only the debt secured by the mortgage and interest thereon, but also, in case of foreclosure, the costs "and fifty dollars as liquidated damages for the foreclosure of the mortgage," *held*, that the stipulation for the payment of said fifty dollars as liquidated damages is void, and that a judgment rendered under such a stipulation for fifty dollars as attorney fees is erroneous. Foote v. Sprague, 13 Kan. 160.

[5] Condit v. Baldwin, 21 N. Y. 219; Bell v. Day, 32 N. Y. 165. In Palmer v. Call, 7 Federal Reporter, 737, McCrary, C. J., says: "Doubtless, in general, the intent of an agent acting within the scope of his authority may be imputed to the principal. But it is settled beyond question that if any agent in good faith makes a loan for another, and without the knowledge or authority of his principal, and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal." And see cases cited.

But where the agent exacts the bonus for his principal, the lender, and the agent of the borrower assents to its reservation, it will be usurious.[1]

The practice of reserving the interest on negotiable paper at the time of making a loan, although its effect is to cause the borrower to pay more than the legal rate, is very ancient and has generally been sanctioned by law.[2] So also

[1] Estevez v. Purdy, 6 Hun, 46. And see Algar v. Gardner, 54 N. Y. 365.

[2] McGill v. Ware, 5 Ill. 21; Goodrich v. Reynolds, 31 Ill. 490; Manhattan Co. v. Osgood, 15 Johns. 168; New York Fire Ins. Co. v. Ely, 2 Cow. 678; Fleckner v. Bank of the U. S., 8 Wheat. 339; Maine Bank v. Butts, 9 Mass. 49; Tholen v. Duffy, 7 Kan. 405. The older cases in England held that such a practice was usurious. Barnes v. Worlick, Cro. Jac. 25. Later cases, however, established the contrary doctrine (Lloyd v. Williams, 2 W. Bl. 792; Floyer v. Edwards, Cowp. 112), although it was claimed that the custom should be confined to bankers and those who deal in bills of exchange or promissory notes by way of trade. Marsh v. Martindale, 3 B. & P. 154. Though the weight of authority in this country seems to favor the proposition stated in the text, there has been much opposition to it. Savage, C. J., in The Bank of Utica v. Wager, 2 Cowen, 757, says: "This privilege of deducting the interest by way of discount, I apprehend, is confined to bankers and those who deal in bills of exchange or promissory notes by way of trade. This is so, at least, in England." In that case there are calculations and also a table of the differences between discount and interest, by which in one instance it appears that the difference on $1,000 for fifteen years, at 6 per cent., is $537.80, and he says: "Were the question upon this practice *res integra*, I should think it a palpable violation of the statute," but he adds, after citing the cases of The Manhattan Company v. Osgood, *supra*, and Fleckner v. Bank of U. S., *supra*. "Both courts found their decision upon the practice of bankers and commercial convenience, and the point may therefore be considered as settled until the legislature alters it." Chancellor Kent, in Dunham v. Gould, 16 Johns. 373, denies the whole doctrine and says: "It is perfectly idle to talk of a custom of merchants to take a commission above a legal rate of interest on the exchange of notes. The custom of merchants is not applicable to such a case. It is not a matter of trade and commerce within the meaning of the law merchant, and if there were such a local custom in New York, it would be null and void, and could not be set up as a cover or pretext to trample down the law of the land. The money lenders throughout the country might as well set up a practice of their own, and then plead it in bar of the statute."

where the interest is calculated upon the debt and included in the mortgage in excess of the strict legal right.[1]

Although courts will rarely, if ever, as between debtor and creditor, enforce an executory contract for the payment of compound interest, yet the payment of it is not necessarily in a legal sense the payment of usury; and if a debtor knowingly, understandingly and unconditionally pays it under no peculiar circumstances of oppression, it cannot be recovered back.[2] The Supreme Court of the United States has held that interest warrants or coupons draw interest after payment of them is unjustly neglected or refused.[3]

In some of the States, it is now provided by statute that compound interest may be contracted for; and in others the objection to such a contract has been removed by the repeal of the usury laws.[4]

When a mortgage is executed in a different State from

[1] Spencer v. Ayrault, 10 N. Y. 202.

[2] Culver v. Bigelow, 43 Vt. 255. In general, compound interest will not be allowed unless by express agreement made after such interest is due. Force v. City of Elizabeth, 28 N. J. Eq. 404. And see Hastings v. Wiswall, 8 Mass. 455; Henry v. Flagg, 13 Metc. 64; Doe v. Warren, 7 Me. 48; Bannister v. Roberts, 35 Me. 75; Banks v. McClellan, 24 Md. 62; Andrews v. Poe, 30 Md. 485; Van Husan v. Kanouse, 13 Mich. 303; Leonard v. Villars, 23 Ill. 377; Niles v. Commissioners, 8 Blackf. 158; Averill Coal Co. v. Verner, 22 Ohio St. 372; Connecticut v. Jackson, 1 Johns. Ch. 13; Forman v. Forman, 17 How. Pr. 255; Rose v. City of Bridgeport, 17 Conn. 243; Doe v. Vallejo, 29 Cal. 385; Stone v. Bennett, 8 Mo. 41; Stoner v. Evans, 38 Mo., 461; Stokeley v. Thompson, 34 Pa. St. 210; Childers v. Deane, 4 Rand. 406; Pindall v. Bank of Marietta, 10 Leigh, 481. But it has been held in some of the States that when interest is payable in instalments, as semi-annually, interest will be allowed upon failure to pay such instalments when due. House v. Tennessee College, 7 Heisk. 128; Talliaferro v. King, 9 Dana, 331; Bledsoe v. Nixon, 69 N. C. 89; Bratton v. Allison, 70 N. C. 498; Peirce v. Rowe, 1 N. H. 179; Townsend v. Riley, 46 N. H. 300; Wheaton v. Pike, 9 R. I. 132; Lanahan v. Ward, 10 R. I. 299; Austin v. Imus, 23 Vt. 286; Preston v. Walker, 26 Iowa, 205; Gibbs v. Chisholm, 2 Nev. & M. 38; Wright v. Eaves, 10 Rich. Eq. 582; Lewis v. Paschal, 37 Tex. 315.

[3] Aurora City v. West, 7 Wall. 82 Thomson v. Lee, 3 Wall. 327.

[4] Comp. Laws Mich. 1871, § 1637; Laws Minn., 1877, ch. 15; Rev. Stat. Mo., 1879, vol. 1, § 2728; Waples v. Jones, 62 Mo. 440; Civil Code of Cal., 1873, § 1919.

that in which the land is situated, in respect to the requisites of its execution, so far as it is designed to affect the real estate, the law of the place where the land is situated governs. But in so far as the contract is personal, the general rule is, that the law of place where it is made must control.[1] In respect to interest and usury laws the general rule is that the contract is to be construed with reference to the law of the place where the debt is payable.[2] Where no place of payment is specified, the contract is presumed to be payable where the parties reside and the contract is made, although the land be situated in another State.[3] It is competent, however, for the parties to stipulate for interest with reference to the laws of either the place of contract or the place of payment, provided the provision be made in good faith, and not as a cover for usury.[4]

§ 450. **Covenant to Keep the Premises in Repair.**—A covenant that the mortgagor will keep the premises in a fair state of repair is sometimes inserted in a mortgage, and when so inserted is usually made a part of the condition. Such a covenant frequently becomes of importance in preventing a depreciation in the value of the mortgaged property by reason of a failure to repair, as the mortgagor is not otherwise bound to keep the premises in repair.[5] Says Chancellor Kent: "There is no instance in which a court of equity has undertaken to correct permissive waste, or to compel the mortgagor to repair; though cases of negligence rapidly impairing the security, without any overt act whatever, would address themselves with peculiar force to the

[1] Duncan v. Helm, 22 La. Ann. 418.

[2] Peck v. Mayo, 14 Vt. 33; Duncan v. Helm, 22 La. Ann. 418; Vinson v. Platt, 21 Ga. 135; Kennedy v. Knight, 21 Wis. 340. And see Stickney v. Jordan, 58 Me. 106. Where a contract is made payable in another State for the purpose of evading the usury laws of the State where the contract is executed, the law of the place of contract decides the fate of the security. Andrews v. Pond, 13 Pet. 78; Mix v. Madison Ins. Co., 17 Ind. 117.

[3] Cope v. Alden, 53 Barb. 350; *s. c.*, 41 N. Y. 303.

[4] Townsend v. Riley, 46 N. H. 300.

[5] Campbell v. Macomb, 4 Johns. Ch. 534.

courts of equity in New York, since the mortgagee is left to guard his pledge against such contingencies, by his own provident foresight and vigilance in making his contract, or to seek for aid in the enlarged discretion of a court of equity, which would interfere for his indemnity in special cases, in which justice manifestly required it."[1] But an injunction will lie against a mortgagor in possession of the mortgaged premises, to stay waste, by which the security is impaired.[2]

§ 451. **Covenant for the Payment of Taxes.**—Taxes upon lands under mortgage, and which constitute a lien upon the same, are assessed to the mortgagor if in possession, and are to be paid by him.[3] But in order to avoid an accumulation of an incumbrance paramount to that of the mortgage, it is usually provided by way of condition that the mortgagor shall pay all taxes and assessments levied upon the premises. And a breach of such condition is as effectual to give the mortgagee a right to enforce his mortgage, as a breach of the condition to pay any instalment of interest or principal.[4] A stipulation, similar to that which is sometimes used to enforce the payment of interest, may also be applied to taxes, namely: that, upon default in such payment, the principal debt shall become due, and such a

[1] 4 Kent's Com. 162. In some of the States, if the assignee of the mortgagor remove fixtures from the land, or cut down and carry away timber growing thereon, he is liable to the mortgagee in an action of trespass *quare clausum fregit* for their value. Stowell v. Pike, 2 Me. 387; Smith v. Goodwin, *Id.* 173; Page v. Robinson, 10 Cush. 99. But as a general thing the mortgagee has no power in a court of law to prevent or obtain damages for waste committed by the mortgagor. Cooper v. Davis, 15 Conn. 556; Peterson v. Clark, 15 Johns. 205.

[2] Brady v. Waldron, 2 Johns. Ch. 147; Cooper v. Davis, 15 Conn. 556.

[3] Parker v. Baxter, 2 Gray, 185; Kilpatrick v. Henson (Ala.), 1 South. Rep. 188. Notice and proceedings requisite to enforce their payment by sale are to and with the mortgagor as owner. Ralston v. Hughes, 13 Ill. 469; Kortright v. Cady, 23 Barb. 490; Coombs v. Warren, 34 Me. 89; Beltram v. Villere (La.), 4 South. Rep. 506.

[4] Pope v. Durant, 26 Iowa, 233; Harrington v. Christie, 47 Iowa, 319.

provision will be sustained.[1] But where the provision is that the mortgagor shall pay the taxes and assessments upon the mortgaged premises, and, in default of so doing, that the mortgagee may discharge the same, and collect them as a part of the mortgage, the failure of the mortgagor to pay the taxes is not such a breach of the condition of the mortgage as will give the mortgagee the right to foreclose and collect the whole amount secured.[2] We have seen that the mortgagee may pay the taxes levied upon the premises, and that the amount so paid becomes a lien under the mortgage; and this is true whether the mortgage so provides or not.[3] But a covenant by the mortgagor for the payment of all taxes assessed upon the premises, cannot be enforced after the mortgage debt is discharged. And in this respect the effect is the same, whether the mortgagor voluntarily pays the mortgage debt, or the mortgage is discharged by foreclosure and sale. Thus, where the mortgagee purchased the premises at the foreclosure sale for less than the amount of the judgment, and the deficiency was paid by the mortgagor, and the mortgagee was afterwards obliged to redeem the premises, which had been sold for certain taxes assessed

[1] *Ante*, § 445; O'Connor v. Shipman, 48 How. Pr. 126; Stanclift v. Norton, 11 Kan. 218. And see Sharp v. Barker, 11 Kan. 381; Medley v. Elliot, 62 Ill. 532.

[2] So held, where the mortgage further provided that upon default in the payment of principal or interest, or of the taxes as provided, the mortgagee might sell, and out of the proceeds of the sale retain the whole debt and interest together with "such taxes and charges as shall have been paid by him." To give that right, it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. Williams v. Townsend, 31 N. Y. 411.

[3] *Ante*, § 443; Sharp v. Barker, 11 Kan. 381; Sidenberg v. Ely, 43 Amer. Rep. 163; Horrigan v. Wellmuth, 77 Mo. 542. Where one holds the legal title as security and purchases the tax certificates, he holds those in trust also, and is entitled to interest on their amount. Fisk v. Brunette, 12 Amer. Law Reg. (N. S.) 194. But see Williams v. Townsend, 31 N. Y. 411, where it is held that a mortgagee, who buys the mortgaged premises at a tax sale, does not thereby pay the taxes and discharge the lien; but is entitled to hold the title thus acquired with all the rights and incidents which the law attaches to it.

upon them between the execution of the mortgage and the foreclosure sale, it was held that the mortgagor could not be compelled to pay the mortgagee the amount of the taxes so paid.[1]

§ 452. **Covenant to Keep the Premises Insured.**—When the property consists of buildings, it is usual that the mortgagor covenants to keep them, so long as the mortgage lasts, insured against fire in a certain sum, for the benefit of the mortgagee.[2] A breach of the condition attached to such covenant is, of course, as effectual to work a forfeiture and to authorize a foreclosure of the mortgage, as the breach of any of the covenants and conditions heretofore mentioned.[3] The mortgagee may, however, waive the forfeiture, and effect the insurance himself, in which case he is entitled to credit for the premiums paid.[4]

In the absence of any provision authorizing the mortgagee to insure, or obliging the mortgagor to do so, an insurance effected by the mortgagee cannot be charged to the mortgagor.[5] The mortgagee, however, has an insurable interest and may take out a policy in his own behalf.[6] In which case the mortgagor has no claim to the insurance

[1] Hitchcock v. Merrick, 18 Wis. 357.

[2] The stipulation for insurance for the mortgagee's benefit, being intended to afford security supplementary to and connected with the mortgage, and to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn, is in equity a sort of adjunct to the mortgage and is binding on the mortgagor and all others in his shoes with notice. Miller v. Aldrich, 31 Mich. 408.

[3] When a mortgagor covenants in the mortgage to insure the improvements on the mortgaged premises for a specific sum, his failure to insure for that sum constitutes such a default as will justify the mortgagee in selling the premises under a power contained in the mortgage, and it does not impair the mortgagee's right that the covenant was impossible of execution. Walker v. Cockey, 38 Md. 75.

[4] Fowley v. Palmer, 5 Gray, 549; Leland v. Collver, 34 Mich. 418.

[5] Saunders v. Frost, 5 Pick. 259; Dobson v. Land, 8 Hare, 216.

[6] The insurance of the mortgage interest is not an insurance of the debt, but of the interest of the mortgagee in the property, upon the safety of which depends his security. Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool, 55 N. Y. 343, 357.

money as a payment of the mortgage debt: but must pay the whole amount of the debt to the mortgagee.[1] But when insurance is effected by the mortgagee under authority contained in the mortgage, or the mortgagor's covenant to insure, and at his expense, the mortgagor is entitled to have the insurance money applied to the discharge of the mortgage.[2] And on the other hand, if there is no covenant or agreement in the mortgage that the premises shall be insured for the benefit of the mortgagee, the mortgagor may insure for the full value of the property, and recover the sum insured.[3] The mere fact that the mortgage covers the property insured and the insured is personally liable for the debt, gives the mortgagee no corresponding claim to the insurance money. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor.[4] But when the mortgage contains such a covenant, if the mortgagor takes out a policy in his own name and fails to assign it, or make it payable to the mortgagee, the latter is regarded as having an equitable lien upon the proceeds of the policy, to the extent of his interest.[5] And this was so held, although the provision was that the mortgagee, in default of the mortgagor's insur-

[1] White v. Brown, 2 Cush. 412; King v. State Mutual Fire Ins. Co., 7 Cush. 1; Bean v. Atlantic & St. L. R. Co., 58 Me. 82. Though, if the debt had been paid at the time of the loss, the mortgagee's insurable interest being terminated, he would have no claim to the insurance. Jones on Mortgages, § 421; King v. State Mutual Fire Insurance Co., 7 Cush. 1.

[2] Waring v. Loder, 53 N. Y. 581. The policy in effect is furnished by the mortgagor. The mortgagee receives the money in the first place to apply to the mortgage debt, and then he is trustee for the mortgagor for the balance left in his hands. Fowley v. Palmer, 5 Gray, 549.

[3] His insurable interest continues so long as he has a right of redemption. Illinois F. Ins. Co. v. Stanton, 57 Ill. 354; Stephens v. Ill. Mut. F. Ins. Co., 43 Ill. 327; Strong v. Manufacturers Ins. Co., 10 Pick. 40.

[4] Columbia Ins. Co. v. Lawrence, 10 Pet. 507; Carpenter v. Washington Ins. Co., 16 Pet. 495; Nichols v. Baxter, 5 R. I. 491; Nordyke Co. v. Gery (Ind.), 13 N. E. Rep. 683. Unless the policy be assigned to him. Plimpton v. Ins. Co., 43 Vt. 500.

[5] Thomas v. VonKapff, 6 Gill & J. 372; Carter v. Rockett, 8 Paige Ch.

ing, might take out a policy at the expense of the mortgagor, and that the premium should be covered by the mortgage security.[1]

It frequently happens that the policy is taken out in the name of the mortgagor, but the insurance is made payable to the mortgagee in case of loss. Such a provision in the policy has the effect of an assignment.[2] The contract is with the mortgagor, and it is the damage sustained by him and not the party appointed to receive the payment, that is recoverable from the insurers.[3]

§ 453. **Reservation of the Right of Possession to the Mortgagor.** — We have seen that in those States in which the common-law doctrine of mortgages prevails, the mortgagee is entitled to immediate possession of the mortgaged premises, unless the right to retain the possession until default is reserved to the mortgagor.[4] In such States, therefore, if it be the intention that the mortgagor shall retain the possession, a clause should be inserted to that effect.[5] In the absence of any provision of the kind, parol evidence cannot be received to prove that such was the intention of the parties at the time of making the mortgage. Though it has been held that the agreement need not be expressed in the mortgage, but may be implied from a note made by the mortgagor to the mortgagee at the same time with the mortgage.[6] And if the condition of the mortgage be such as to imply the possession of the mortgagor for the purpose of performing it, as a condition to support the

437; Vernon v. Smith, 5 Barn. & Ald. 6; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 446.

[1] Nichols v. Baxter, 5 R. I. 491.

[2] Ennis v. Harmony Fire Ins Co., 3 Bosw. (N. Y.) 516.

[3] Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn, 17 N. Y. 391.

[4] *Ante*, § 407, p. 348.

[5] *Ante*, § 407. Coffey v. Hunt, 75 Ala. 236. If there is no affirmative covenant that the mortgagor shall continue in possession with power to take the rents, profits and issues until default be made, he will not be regarded as tenant of the mortgagee. McKim v. Mason, 3 Md. Ch. 186.

[6] Clay v. Wren, 34 Me. 187, although the note was not referred to in the mortgage.

mortgagee on the land, the mortgagor is entitled to possession, although such right is not expressly provided for.[1] When the right of possession is reserved to the mortgagor, the mortgagee cannot enter until default, and he cannot then authorize another person to occupy the premises, in exclusion of the owner of the equity of redemption, before an actual entry made, or before possession has been recovered by suit.[2]

§ 454. **Reservation of the Right to Perform the Condition before the Time Limited.**—If it be intended that the mortgagor shall have the right to pay the mortgage debt before the same becomes due, and thereby discharge the mortgage, such a provision should be inserted in the mortgage. Otherwise the mortgagee cannot be compelled to receive payment sooner, and if he refuses such payment, the mortgagor will be obliged to continue to pay interest until the time fixed by the mortgage at which payment is to be made.

Where the reservation in a mortgage was of a right "to pay all or any part of the indebtedness at any time during the present year, in current paper funds," it was held that the reservation did not restrict the privilege of payment to a single occasion; but the payment could be made by instalments at any time during the year, and a tender in Confederate treasury notes, current at the time, although greatly depreciated, was a good tender.[3]

§ 455. **Of the Right to have a Portion of the Premises Released.**—Sometimes the stipulation is that, upon making certain payments, the mortgagor shall be entitled to have a certain portion of the mortgaged premises released from the lien of the mortgage. Such a provision can only be enforced by a strict performance of the condition;[4] but when the condition is performed, it has the same effect to

[1] Norton v. Webb, 35 Me. 218; Brown v. Leach, *Id.* 39; Wales v. Mellen, 1 Gray, 512. But see Coleman v. Packard, 16 Mass. 39.

[2] Silloway v. Brown, 12 Allen, 30.

[3] Stalworth v. Blum, 41 Ala. 319.

[4] Pierce v. Kneeland, 16 Wis. 672.

discharge the mortgage as to the particular part, as payment of the entire sum due on the mortgage would have.[1]

ARTICLE VII.

THE POWER OF SALE.

SECTION.

458. The form and requisites of the power.
459. The events upon which the exercise of the power depends.
460. Purchasers not to be bound to inquire whether they have happened.
461. Application of the proceeds of the sale.

§ 458. **The Form and Requisites of the Power.**—No particular form of words is necessary to constitute the power.[2] Nor is it essential that it should be contained in the same instrument. It may even be in the form of a power of attorney to a third person.[3] But such a method of drawing a mortgage would neither be useful nor desirable.[4] It is usual that the power of sale assumes the form of an

[1] See *Infra*, § 454.

[2] A provision that upon default in the payment, "the mortgagee shall advertise twenty days, and sell enough of the estate herein conveyed to him to pay said amount then due, and said mortgagor shall have the right to direct what shall be sold," was held to be a sufficient power of sale. Hyman v. Devereux, 63 N. C. 624. The rule that a mistake so obvious as to leave no doubt of the intention of the parties, does not require external evidence for its removal, applied to a case where the power was granted to the "party of the first part" who was the mortgagor, instead of to the party of the second part. Gaines v. Allen, 58 Mo. 537.

[3] Brisbane v. Stoughton, 17 Ohio, 482. A power of sale may be valid also, though it be not co-extensive with the condition of the mortgage. Butler v. Ladue, 12 Mich. 173.

[4] It seems that if the power be not in the deed itself, but in a separate instrument, the purchaser might insist that the mortgagor should be a party to the conveyance. Croft v. Powel, Com. Rep. 603.

agreement that, if the mortgage money be not paid when due, the mortgagee, his executors, administrators or assigns may in a certain number of days thereafter, and with such precautions to secure a fair price as may be agreed upon, sell the land, and apply the proceeds after defraying the expenses of the trust, to the payment of the mortgage debt, and then pay over the residue to the mortgagor or his legal representatives. Although a power of sale may sometimes be implied from the terms of the instrument,[1] it should always be expressly and fully conferred, and all the essential provisions in respect to the same distinctly set out, since the title of the purchaser under a power rests upon the authority therein given.[2] The deed, therefore, usually designates the place of sale, and the notice to be given; but if these matters are left to the discretion of the trustee, a sale made by him in good faith and according to his best judgment will be sustained.[3] In some of the States, however, the notice to be given is prescribed by statute, in which case the statute must be followed, whatever may be the provisions of the deed.

It is observed by Mr. Dean, that the power of sale is limited to the mortgagee and his personal representatives or his or their assigns, for the reason that a mortgage debt is personal assets, and it is desirable that the sale, if it takes place, should be made by the persons entitled to receive the

[1] Purdie v. Whitney, 20 Pick. 25.

[2] Mundy v. Vawter, 3 Gratt. 518; Evans v. Lee, 11 Nev. 194; Graeme v. Cullen, 23 Gratt. 266. Parties to a mortgage may, by stipulation, regulate the terms of the power of sale of the premises by the mortgagee and courts will not interfere to control that right in the absence of fraud or of some statutory regulation on the subject. Elliot v. Wood, 45 N. Y. 71. Where the power granted to a mortgagee to sell mortgaged premises is limited to a specified time, if he fail to execute it within that time, the power is forever gone. Lockett v. Hall, 1 Woods, 552. Powers of sale in mortgages are not favored. Mosby v. Hodge, 76 N. C. 387. In Vermont the courts were reluctant to admit the principle of such a sale, and still hold that it "ought not to be recognized in any case, unless it is conveyed by an express grant and in clear and explicit terms." Wing v. Cooper, 37 Vt. 184.

[3] Ingle v. Culbertson, 43 Iowa, 265.

purchase-money under it. The same author further remarks that, "Care should be taken to include the mortgagee's assigns amongst the persons who may exercise the power; for it has been held, that a power of sale, vested in A. and 'his heirs,' cannot be exercised by an 'assign' of A., even though the deed empowers the 'assigns' of A. (amongst others), to give a receipt for the purchase-moneys obtained by such a sale; and since the same reasoning would apply to a power given to A., 'his executors and administrators' only, the word 'assigns' is necessary to allow of the power of sale being exercised by any person who has taken a transfer of the mortgage."[1]

If the mortgage does not provide that an assignee may execute the power, the law does not, in general, confer it upon the assignee, and it can only be exercised by the mortgagee.[2] But if the power so provides, it may be exercised by an assignee who has acquired the whole interest of the mortgagee.[3] He must be the legal assignee of both the debt and mortgage. An equitable assignee cannot execute the power.[4] But if the entire interest of the mortgagee passes to the assignee, the power may be exercised by the latter; and it matters not in this respect whether the assignment is by deed or in law.[5] It may be added, that a

[1] Dean's Pr. Conv. 397, which cites Bradford v. Belfield, 2 Sim. 264; Townsend v. Wilson, 1 Barn. & Ald. 608.

[2] Flower v. Elwood, 66 Ill. 438. In some of the States, it is provided by statute that the power to sell is to be deemed a part of the security, and that it vests in and may be executed by any person who becomes entitled to the money by assignment or otherwise. Alabama Code, 1876, § 2198; Cal. Civil Code, 1872, § 895; 2 Dassler's Kansas Stat., § 5631.

[3] Heath v. Hall, 60 Ill. 344; Hamilton v. Lubukee, 51 Ill. 415; Brown v. Delaney, 22 Minn. 349; Strother v. Law, 54 Ill. 413; Harnickell v. Orndorff, 35 Md. 341.

[4] Pickett v. Jones, 63 Mo. 199; McGuire v. Van Pelt, 55 Ala. 344; Dill v. Satterfield, 34 Md. 52; Pardee v. Lindley, 31 Ill. 174; Strother v. Law, 54 Ill. 413; Mason v. Ainsworth, 58 Ill. 166. But in Illinois the legal assignment of the debt carries the mortgage and vests the power of sale in the assignee. Hamilton v. Lubukee, 51 Ill. 415; Bush v. Sherman, 80 Ill. 160. And see *post*, Chap. X., Art. II.

[5] Lewis v. Wells, 50 Ala. 198; Johnson v. Turner, 7 Ohio, 568. Where

power of sale, being in its nature an invisible thing, if the mortgagee conveys only a part of the debt, he does not confer the power *pro tanto* upon his grantee.[1]

If there be two or more joint mortgagees or trustees, the power should be extended to the survivors and survivor of them, and the executors or administrators of such survivor, or their or his assigns. In which case the power must be executed by all the donees, or the executors or administrators of such as are dead.[2] It is a general rule that trustees have equal power, interest and authority with respect to the trust estate. They cannot, therefore, act separately; but they must all join in any sale, lease or other disposition of the trust property, and also in receipt of money payable to them in respect of their office;[3] unless it clearly appears that the interest was a joint one, and that the intention was that the security with all the advantages of the power should vest in the surviving mortgagee, in which case he may act alone.[4] Or if the provision is that the grantees "or either of them" may sell, then the power may be exercised by one alone; yet if they elect to act jointly, as by giving a joint notice of sale, one cannot afterwards deny the authority of his co-trustee, and act alone.[5] Where the trustees are either directly or remotely interested in the trust, the better practice is for all to join in the execution of the power. But ordinarily, in deeds of trust, no beneficial interest is vested in the trustees and no advantage is to be derived to them by the exercise of the power, in which case, if one of them dies, the survivors take the entire legal es-

power is given to the mortgagee, "his heirs and assigns," it may be exercised by his administrator. Lewis v. Wells, *supra*. And see Merrin v. Lewis, 90 Ill. 505.

[1] 2 Washb. on Real Prop., 4th ed., 70.

[2] Townsend v. Wilson, 3 Madd. 139.

[3] A trust or power given to two or more is joint, unless there are words added which make it several also. Hill on Trustees, 305.

[4] Hind v. Poole, 1 Kay & J. 383.

[5] White v. Watkins, 23 Mo. 423.

tate, and may execute the trust, although there be no express provision to this effect in the deed.[1]

If the mortgage is given to secure a trust fund, or if it be in form a deed of trust, the power is properly limited to the mortgagee, or trustee, "and his successor or successors in trust." If it be intended that the trustee shall have power to assign the trust, such intention should be clearly stated. The addition, simply of the word "assigns" may not be sufficient in such case. In a deed of trust, as we have seen, another person than the beneficiary or owner of the debt is named as donee of the power. No estate is conferred upon him as a creditor; but special trust and confidence is reposed in him solely as trustee, and no other relation exists between him and the trustor than one of a fiduciary character. Consequently, he cannot delegate his duties to another, unless the instrument creating the trust clearly confers such power upon him. Thus, where the deed was to two persons, or the survivor of them, and to the heirs and *assigns* of the survivor, it was held that the surviving trustee could not substitute another to the powers conferred upon him by the deed of trust.[2] For the word "assigns" does not necessarily mean a person who may be made such by the spontaneous act of the surviving trustee to take effect during his life; but has been held to mean the person who may be made such by device and bequest.[3]

If the trustee in a deed of trust declines to execute the trust, he may be compelled to do so by the intervention of a court of competent jurisdition.[4] Or if the trustee re-

[1] Hannah v. Carrington, 18 Ark. 85; Franklin v. Osgood, 14 Johns. 527.

[2] Whittelsey v. Hughes, 39 Mo. 13.

[3] Titley v. Wolstenholme, 7 Beav. 425.

[4] Sargent v. Howe, 21 Ill. 148; Bradley v. Chester Valley R. R. Co., 36 Pa. St. 141. The terms of the deed fix the rights of the grantor as to redemption, as well as the rights and duties of the trustee; and courts may enforce a sale in such case, even where they have no equity jurisdiction which would give them authority to cause a sale to be made for the purpose of foreclosing a mortgage. Reece v. Allen, 10 Ill. 236;

moves from the jurisdiction of the court, dies, or becomes otherwise incapacitated, a successor may be appointed to execute the trust;[1] and a sale, made in pursuance of such decree, is not a sale made under a decree of foreclosure, but by virtue of the power in the trust deed.[2] To avoid the delay and expense necessarily attendant upon such a contingency, it is usual in some of the States for the deed to provide that "in case of the absence, death, refusal to act, or disability in anywise" of the trustee, the (then) acting sheriff of the county, at the request of the legal holder of the note, may proceed to sell the property, etc.[3] A similar proviso is also inserted in power of sale mortgages, whereby, at the request of the legal holder of the note, the sheriff of the county is authorized to execute the power; in which case the sheriff may, at the request of the legal holder of the note, advertise and sell pursuant to the power, and may execute conveyances in the name, and as the attorney in fact of the mortgagor. And in Illinois it seems that the mortgagee may purchase at the sale.[4] But in Missouri it has been held that the mortgagee and sheriff, in such case, are, for the purposes of making the sale, constituted co-trustees, with an alternative power in each to execute the trust; and therefore the mortgagee cannot, by refusing to make the sale, and thereby procuring it to be made by the sheriff, relieve himself of his disability to purchase at the sale. And the same disability to purchase at

Heard v. Baird, 10 Miss. 796; Bradley v. Chester Valley R. R. Co., *supra*; Brisbane v. Stoughton, 17 Ohio, 488; Koch v. Briggs, 14 Cal. 256; Marvin v. Titsworth, 10 Wis. 320.

[1] Harris v. Rucker, 13 B. Mon. 564; White v. Hampton, 13 Iowa, 259.

[2] Rice v. Brown, 77 Ill. 549; Beatie v. Butler, 21 Mo. 313; Doolittle v. Lewis, 7 Johns. Ch. 45.

[3] Where a mortgage given by a railroad company provided that upon the death, removal or incapacity of the trustee, the majority of the bondholders might designate in writing a person to execute the trust, and the bondholders selected a new trustee in place of one who had permanently removed from the State, the court recognized the new trustee to the exclusion of the other. Farmers' Loan and Trust Co. v. Hughes, 11 Hun (N. Y.), 130.

[4] Rice v. Brown, 77 Ill. 549.

the mortgage sale attaches to an agent of the mortgagee for the collection of the debt, as to the mortgagee himself.[1]

§ 459. **The Events upon which the Exercise of the Power Depends.**—The right to exercise the power is always made contingent upon the mortgagor's default in the payment of the mortgage debt or the performance of other covenants or agreements contained in the mortgage. It is generally stipulated also that the mortgagee shall first give notice of the sale in such manner as may be agreed upon, which is usually by advertisement in some newspaper for a certain length of time, or by posting written or printed hand-bills. In some of the States, as has been remarked, the notice to be given is prescribed by statute, in which case it is better to omit this clause from the deed, lest a conflict may arise between the wording of the statute and of the power. The statute must be strictly followed, whatever may be the terms of the power. That is to say, the power cannot dispense with any of the requirements of the statute.[2] Though it is doubtless competent for the parties by their agreement to impose additional obligations upon the mortgagee.[3] The purchaser is bound to know the requirements of the deed and of the statute in such case, and to see that they have been strictly complied with[4]. If the power is illegally exercised, the mortgagor may still redeem.[5]

[1] Gaines v. Allen, 58 Mo. 537. See Thornton v. Irwin, 43 Mo. 153; Allen v. Ranson, 44 Mo. 263.

[2] So held where the statute required all sales to be at public auction, but the power authorized a private sale. Lawrence v. Farmers Loan and Trust Co., 13 N. Y. 200. But see Elliott v. Wood, 53 Barb. 285.

[3] But see Butterfield v. Farnham, 19 Minn. 85, where it was held that if a power of sale mortgage be foreclosed conformably with the statute, it is sufficient, irrespective of the requirements of the power.

[4] See *infra*, § 460.

[5] Root v. Wheeler, 12 Abb. Pr. 294. The original purchaser at a sale by a mortgagee, under a power of sale contained in the mortgage, is chargeable with notice of defects and irregularities attending the sale, and cannot evade their effect. But as to the remote purchasers, the sale is only voidable on proof of actual knowledge. Hamilton v. Lubukee, 51 Ill. 415.

§ 460. **Purchasers not to be Bound to Inquire whether they have Happened.**—In order to prevent any question being raised in regard to the rights of the mortgagee to exercise the power, it is sometimes provided that no purchaser shall be bound to inquire whether any default has occurred in the payment of either principal or interest or in the performance of any of the conditions of the mortgage; or whether notice has been given in accordance with the provisions of the mortgage or otherwise; or whether there has been any irregularity or impropriety in the sale; but that the mortgagor's only remedy in any such event shall be in damages against the mortgagee. Sometimes the provision is that any statement, fact or recital of the trustee in relation to the non-payment of the money secured to be paid, the advertisement, sale, receipt of the money, and execution of the deed to the purchaser, shall be received as *prima facie* evidence of such fact. In the absence of such a provision in the power, or of the statute to that effect, such recitals in the deed of the mortgagee are no evidence of the facts narrated, but such facts must be proved by other competent evidence.[1] If the mortgage contains such a stipulation, a failure to comply with any of the conditions so specified, if neither known nor acquiesced in by the purchaser, will not affect the sale. But if the purchaser knows that the sale is irregular, it cannot be maintained, although the mortgage contains a proviso that notwithstanding any such irregularity in the sale, the same shall be deemed, as regards the purchaser, to be within the power of sale and be valid accordingly.[2]

§ 461. **Application of the Proceeds of the Sale.**—The next clause in an ordinary mortgage is that, out of the proceeds of such sale, the mortgagee shall first pay the costs and expenses attending the sale; and next, the amount secured by the mortgage; and, finally, pay over the remain-

[1] See *Ante*, § 73. The burden of proving a proper advertisement rests upon the purchaser or other person insisting upon the sale. Gibson v. Jones, 5 Leigh (Va.), 370.

[2] Dean's Pr. Conv. 308; Jenkins v. Jones, 2 Giff. 99.

der, if any, to the mortgagor or his legal representatives.

A clause is sometimes inserted to the effect that the receipt for the purchase-money, given by the persons who are to exercise the power of sale, shall be a sufficient discharge to the purchaser, and that he shall not be bound to see to its application, or be answerable for its misapplication. It does not appear that such a clause is of much importance in this country, unless, perhaps, under peculiar circumstances where provision is made for the application of a trust fund. It is a general rule that the party who pays the purchase-money to the person authorized to sell is not bound to look to its application, unless the money be misapplied with his co-operation.[1] A mortgagee with power of sale cannot be regarded in any respect as the trustee for subsequent incumbrancers. To the extent of the mortgage and costs, the purchase-money upon the foreclosure sale belongs to him absolutely; and although as between him and the mortgagor a trust under the conditions of the mortgage may arise as to the surplus moneys, yet, until the money constituting the surplus has been actually paid over, there can be no foundation for holding him as trustee for the holders of subsequent liens.[2]

[1] Potter v. Gardner, 12 Wheat. 498.

[2] Russell v. Dutton, 4 Lans. 399.

CHAPTER X. — Assignments — And herein of Purchasers of the Equity of Redemption.

Article I. Of Purchasers of the Equity of Redemption.
II. Assignments of the Mortgage.

ARTICLE I.

OF PURCHASERS OF THE EQUITY OF REDEMPTION.

SECTION.
463. An important distinction.
464. Whether a purchaser assumes the mortgage or buys subject to it.
465. Of a purchaser subject to the mortgage.
466. Of one who undertakes to pay the mortgage.
467. Of a purchaser of part of the mortgaged property.

§ 463. **An Important Distinction** is to be observed between one who, in purchasing the equity of redemption, assumes to pay the mortgage, and one who merely purchases subject to it; though the chief importance of this distinction relates, as we shall see, to the personal liability of the purchaser.[1] In the one case he becomes personally liable for the payment of the debt, while in the other case he assumes no such liability. Of course, one who pur-

[1] See 18 Cent. L. J. 23; 22 *Id.* 460, for discussion of general subject.

chases property upon which there is an outstanding mortgage, takes it subject to the rights of the mortgagee to enforce the same against the property, provided he has had actual or constructive notice of the incumbrance. The rules in respect to "notice" have been discussed in another part of this work, to which the reader is referred.[1]

§ 464. **Whether a Purchaser Assumes the Mortgage or merely Buys Subject to it,** depends upon the intention of the parties as collected from the whole transaction. A purchaser of mortgaged premises does not, in the absence of a special contract, expressed or implied, become personally liable for the mortgage debt.[2] To constitute a personal obligation, binding him to its absolute payment, something more is required than a mere statement in the deed that it is subject to the mortgage.[3] But no particular form of words is required to create such liability.[4] A stipulation that the conveyance is made "subject to the payment of the mortgage, or that it forms a part of the purchase-money which the grantee in the deed assumes to pay," or any equivalent expression which clearly imports that an obligation is intended to be created by the one party, and is knowingly assumed by the other, will constitute a personal obligation for its payment.[5] It is not necessary that the purchaser should expressly covenant to pay the mortgage, or even join in the deed. The acceptance of a deed which states that he is to pay the same implies a promise on his

[1] *Ante*, Chap. IV., Art. II.

[2] Johnson v. Monell, 13 Iowa, 300; Bumgardner v. Allen, 6 Munf. (Va.) 439; Woodbury v. Swan, 58 N. Y. 380; Edler v. Hasche (Wis.), 31 N. W. Rep. 57.

[3] Stebbins v. Hall, 29 Barb. 524; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Hull v. Alexander, 26 Iowa, 569; Fiske v. Tolman, 124 Mass. 254; Lawrence v. Towle 59 N. H. 28; Fowler v. Fay, 62 Ill. 375; Elliot v. Sackett, 108 U. S. 132; Shepherd v. May, 115 U. S. 505.

[4] Belmont v. Coman, 22 N. Y. 438.

[5] Douglass v. Cross, 56 How Pr. 330; Stebbins v. Hall, 29 Barb. 524; Knowles v. Carpenter, 8 R. I. 548. An agreement that the amount of the mortgage shall be computed and considered as so much of the purchase-money is equivalent to an assumption to pay the mortgage. Tichenor v. Dodd, 4 N. J. Eq. 454; Thayer v. Torrey, 37 N. J. L. 339.

part to do so.[1] And it seems that even a parol promise to pay the mortgage is valid and binding upon him.[2]

§ 465. **Of a Purchaser Subject to the Mortgage.**— One who merely purchases subject to the mortgage, is not, as we have seen, personally liable for the debt. But a distinction is to be observed between a purchaser of the mere equity of redemption, and one who buys the whole estate, the mortgage being deducted from the purchase price. The former may give up the property at any time in satisfaction of the lien, and thereby discharge himself from further liability.[3] But where the mortgage debt forms part of the consideration, the purchaser is bound to indemnify the grantor, though he enters into no bond or covenant to that effect. The law implies such an undertaking upon his part.[4] The liability in such case, however, is only to indemnify the vendor. He must sue, and must show that he has been damaged. It is only where there is an express agreement to pay the incumbrance, or where such an agreement may be implied from the circumstances, that the purchaser becomes liable to the incumbrancer, or that the latter can sue in the name of the vendor to his use.[5]

It has been held that one who accepts a deed without covenants, for the mortgaged estate, in the absence of a special contract, or without some special circumstances,

[1] Bishop v. Douglass, 25 Wis. 696; Schley v. Fryer, 100 N. Y. 71. But see Mason v. Barnard, 36 Mo. 384, 392.

[2] Bowen v. Kurtz, 37 Iowa, 239.

[3] Tichenor v. Dodd, 4 N. J. Eq. 454. A conveyance expressed to be subject to a mortgage, but without any stipulation that the grantee shall pay it, leaves the grantor primarily liable for a deficiency. Binsse v. Paige, 1 Abb. (N. Y.) App. Dec. 138. Where a purchaser buys mortgaged premises subject to the mortgage, and his deed is expressly made subject to it, though in terms it does not bind him to pay it, he is to be treated as having assumed it, and is personally liable for any deficiency after foreclosure sale. Canfield v. Shear, 49 Mich. 313.

[4] Dorr v. Peters, 3 Edw. Ch. 132; Townsend v. Ward, 27 Conn. 610; Scott v. Featherston, 5 La. Ann. 306; Schlatre v. Greaud, 19 La. Ann. 125; Stevenson v. Black, 1 N. J. Eq. 338; Klopworth v. Dressler, 13 N. J. Eq. 62; Marsh v. Pike, 1 Sandf. (N. Y.) Ch. 210; Blyer v. Monholland, 2 *Id.* 478; Flagg v. Thurber, 14 Barb. 196.

[5] Samuel v. Peyton, 88 Pa. St. 465.

must be held to take it charged with the incumbrance. He cannot, therefore, pay off the debt and then keep it alive by taking an assignment of it to himself, and set it off against an unpaid balance he may still owe his vendor on his purchase.[1] It is, in such case, for the purchaser, and not the vendor, to discharge the lien.[2] But if the land is conveyed by a deed of warranty, no such presumption arises, in which case if the purchaser takes an assignment of the mortgage, it is not thereby discharged; nor can the widow of the grantor maintain a writ of dower against him.[3]

If it appears that the amount of the mortgage was not deducted from the consideration, the purchaser is, of course, under no obligation to pay it; and if he does so, he may deduct the same from the purchase price, although his deed be without covenants and he knew of the existence of the incumbrance.[4] On the other hand, where the purchase is made expressly subject to the mortgage, the land becomes the primary fund for the satisfaction of the mortgage debt.[5] The purchaser is not entitled, therefore,

[1] Atherton v. Toney, 43 Ind. 211. But see Ludington v. Harris, 21 Wis. 239.

[2] Shuler v. Hardin, 25 Ind. 386.

[3] Strong v. Converse, 8 Allen, 557. Otherwise where the deed contains an express stipulation that the grantee shall pay off the mortgage as a part of the consideration. McCabe v. Swap, 14 Allen, 188.

[4] Wolbert v. Lucas, 10 Pa. St. 73.

[5] Flower v. Lance, 59 N. Y. 603; Wilber v. Estate of Warren (N. Y.), 10 N. E. Rep. 263. And the vendor is liable for any deficiency after a foreclosure sale, fairly made. Cleveland v. Southard, 25 Wis. 479. When the owner of a piece of land sells the same subject to a mortgage thereon, the land, in equity, becomes the primary fund for the payment of the debt; and upon payment of the bond, the obligor is entitled to be subrogated to the rights of the obligee, so that he can reimburse himself by recourse to the mortgaged premises, and he may require an assignment of the bond and mortgage to an assignee of his nomination, for his benefit. Johnson v. Zink, 51 N. Y. 333. Where mortgaged premises are conveyed subject to the mortgage, but without any assumption of the debt by the grantee, the land is the primary fund for the payment of the mortgage. The mortgagor becomes a *quasi* security, and has a right to insist upon the collection of the debt, first out of the land. Hence, the purchaser cannot be permitted to discharge the lien of the mortgage by a mere tender without payment. Harris v. Jex, 66 Barb. 232.

to deduct the amount of the incumbrance from the purchase price, nor to have the mortgage debt charged upon the mortgagor personally, in any manner, instead of charging it on the land upon which it was charged by the mortgage.[1]

Whether a grantee of mortgaged premises, who takes a conveyance expressly subject to the mortgage, without any assumption of the debt, is precluded from setting up any defense to its validity, is a question upon which the authorities are not in entire harmony. The prevailing doctrine is that one who takes a conveyance without covenants, cannot, as a general rule, defend against the mortgage. The cases holding this view, proceed upon the theory, that by conveying the land subject to the mortgage, the mortgagor provides for its payment in full out of the purchase-money, and that the acceptance of the deed by the purchaser is, in effect, an agreement that so much of the purchase-money shall be paid to the person holding the mortgage; that if the mortgagor sees fit to provide for the payment to be made in this manner, the purchaser cannot object, even though a part only of the consideration of the mortgage has been paid, or the mortgage is subject to other defenses in the hands of the mortgagor.[2] But one holding under a

[1] Cherry v. Monro, 2 Barb. Ch. 619; Mathews v. Aiken, 1 N. Y. 604. He is not entitled to the benefit of collateral security placed by the vendor with the mortgagee subsequent to the mortgage. Brewer v. Staples, 3 Sandf. (N. Y.) Ch. 579; Stevens v. Church, 41 Conn. 369. Where a mortgagee holding several notes, falling due at different dates, and secured by the same mortgage, has foreclosed, when only a part of the notes were due, under a notice of sale made subject to other notes specified, and has himself become the purchaser, he cannot, after default in redemption, maintain an action against the mortgagor upon the note subject to which the foreclosure sale was made. Shermer v. Merrill, 33 Mich. 284.

[2] Freeman v. Auld, 44 N. Y. 50; *s. c.*, 37 Barb. 587; Crawford v. Edwards, 33 Mich. 355; Ritter v. Phillips, 53 N. Y. 586; Hardin v. Hyde, 40 Barb. 435. The grantee of mortgaged premises who assumes the payment of the mortgage, or who takes the premises expressly charged with its payment, is estopped from alleging usury as a defense. Hardin v. Hyde, *supra;* Cole v. Savage, 10 Paige, 583; Hartley v. Harrison, 24 N. Y. 174; DeWolf v. Johnson, 10 Wheat. 392; Cramer v. Lepper, 26 Ohio St. 59. But see Ludington v. Harris, 21 Wis. 239.

warranty deed from a mortgagor, has a right, in a suit against him by the mortgagee, to prove payment made by the mortgagor, by which the land was relieved of the mortgage.[1] A purchaser who buys with the expressed intention, on his part and on the part of his grantor, to avoid the mortgage, is not estopped from doing so.[2] Or if it appear that the description of the premises, as subject to a mortgage, is merely inserted for the purpose of excepting the mortgage from the covenants, the rule does not apply.[3]

§ 466. **A Purchaser who Undertakes to Pay the Mortgage,** undertakes, as a matter of course, to indemnify the mortgagor against its payment. And if the latter is compelled to pay it, he may recover the amount so paid from the grantee.[4]

But until he has paid the mortgage, he can only recover nominal damages against his grantee, in an action of debt.[5] Though, notwithstanding the purchaser has expressly covenanted to pay it, the debt remains primarily chargeable upon the estate;[6] and therefore, so long as the mortgagor

[1] Williams v. Thurlow, 31 Me. 392.

[2] Newman v. Kershaw, 10 Wis. 333.

[3] Weed Sewing Machine Co. v. Emerson, 115 Mass. 554. See Russell v. Kinney, 1 Sandf. (N. Y.) Ch. 34.

[4] Pike v. Brown, 7 Cush. 133. Upon payment, the obligor is entitled to be subrogated to the rights of the obligee, so that he can reimburse himself by recourse to the mortgaged premises, and he may require an assignment of the bond and mortgage to an assignee of his nomination, for his benefit. Johnson v. Zink, 51 N. Y. 333. Such grantee may so contract with his grantor as to make himself personally liable to the mortgagee for the amount of the mortgage, even though his grantor was not so liable. Merriman v. Moore, 90 Pa. St. 78.

[5] Burbank v. Gould, 15 Me. 118.

[6] Duke of Cumberland v. Codrington, 3 Johns. Ch. 229; Tripp v. Vincent, 3 Barb. Ch. 613; Johnson v. Zink, 52 Barb. 396; Lilly v. Palmer, 51 Ill. 331; Ludington v. Harris, 21 Wis. 239; Cherry v. Monro, 2 Barb. Ch. 619. The assumption of the payment of a mortgage of a tenant in common's undivided share, by various grantees of the whole, by separate deeds, does not extend to the mortgage beyond what is originally covered, nor is it a promise to pay, as part of the purchase-money, so as to give the vendors a lien for it on the whole land. Abell v. Coons, 7 Cal. 105.

remains personally liable, he may, without payment, bring his bill to have the mortgage satisfied with costs, out of the land.[1] Acceptance of a deed, purporting to be subject to a mortgage which the grantee assumes and agrees to pay as part of the consideration binds the grantee to such payment.[2] As between the purchaser and the mortgagor, the latter becomes a surety on the mortgage, and the purchaser makes the debt his own.[3] But the mortgagor cannot by any contract with a third party change his relation to the mortgagee, and consequently the latter may treat both parties as principal debtors toward him, and may have a personal decree against either or both, until by some act he has recognized the purchaser as principal and the mortgagor as security toward him also.[4] In respect to the

[1] Abell v. Coons, 7 Cal. 105.

[2] Dant v. Englebach, 109 Ill. 267; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 46 Amer. Rep. 124; Ellis v. Johnson, 96 Ind. 377. And see Mechanic's Sav. Bank v. Goff, 13 R. I. 516.

[3] Wales v. Sherwood, 52 How. Pr. 413; Corbett v. Waterman, 11 Iowa, 88; Mills v. Watson, 1 Sweeney (N. Y.), 374; Huyler v. Atwood, 26 N. J. Eq. 504. Where a purchaser of real estate incumbered by mortgages, assumes the payment of a portion of the mortgage debts, as a part of the purchase-money, the amount so assumed becomes the personal debt of the purchaser. But the residue is not the personal debt of the purchaser, although he may be compelled to pay the same to save his property. Hence, a general payment, made by the purchaser on the mortgage debts, will be first applied to the portion for which he is personally liable. Snyder v. Robinson, 35 Ind. 311.

[4] Corbett v. Waterman, 11 Iowa, 88; Thompson v. Bertram, 14 Iowa, 476; Burr v. Beers, 24 N. Y. 178; Hebert v. Doussan, 8 La. Ann. 267; Crawford v. Edwards, 33 Mich. 354. The extension of time to the vendee, in the absence of fraud or collusion would not have the effect to release the mortgagor from his personal liability. Corbett v. Waterman, *supra;* Meyer v. Lathrop, 17 N. Y. Sup. Court, 66; *contra*, Calvo v. Davis, 15 *Id.* 222; *s. c.*, 73 N. Y. 211. A mortgage debt is not released, nor a mortgaged discharged, by a release from the mortgagee to a purchaser of the mortgaged estate (in whose deed is contained an agreement that the grantee shall assume and pay the mortgage debt), of all claims and demands arising by virtue of that agreement. Knowles v. Carpenter, 8 R. I. 548. Where a mortgagor's grantee expressly assumes payment of the mortgage, his liability to the mortgagee becomes absolute on the making of the conveyance, and cannot thereafter be discharged by the mortgagor. Douglass v. Wells, 57 How. Pr. 378; Ranney v. McMullen, 5 Abb. N. Cas. 246.

liability of a grantee who accepts a conveyance by the terms of which he assumes to pay an existing mortgage upon the land, to a personal judgment at the suit of the mortgagee in an action to foreclose the mortgage, the authorities are not all agreed. The current of authority, however, appears to be in support of such a liability.[1] The cases which maintain the right of the mortgagee to a personal judgment against such a purchaser, generally place it upon the ground, as above stated, that as between the grantor and grantee, the latter, by virtue of his agreement to pay the mortgage debt, becomes the principal debtor, and the grantor stands in the situation of surety for him; that the agreement to discharge the mortgage being given for the indemnity of the vendor, the creditor is entitled to the benefit of such indemnity, upon the principle that where a surety, or person standing in the situation of surety for the payment of the debt, receives a security for his indemnity and discharges such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, though he did not even know of its existence.[2] Some of the cases, however, place the liability of the grantee in such case upon the broad ground, that when one person makes a promise for the benefit of a third person, the latter may maintain an action upon it.[3] Upon this theory the recovery may be

[1] Corbett v. Waterman, 11 Iowa, 87; Crawford v. Edwards, 33 Mich. 354; Ross v. Kennison, 38 Iowa, 396; Fenton v. Lord, 128 Mass. 466; Lamb v. Tucker, 42 Iowa, 118; Bissell v. Bugbee, 8 Cent. L. J. 272; Miller v. Thompson, 34 Mich. 10; Lawrence v. Fox, 20 N. Y. 268; Schmucker v. Sibert, 18 Kan. 104; Burr v. Beers, 24 N. Y. 178; Bay v. Williams, 112 Ill. 91; Luney v. Mead, 60 Iowa, 469; Cooper v. Foss, 15 Neb. 515; Thorp v. Keokuk Coal Co., 48 N. Y. 253. And this is true, although the grantor was not liable. Dean v. Walker, 107 Ill. 540. A second grantee may also be held liable. Torrey v. Bank of Orleans, 9 Paige, 649. But see *contra*, Crowell v. Currier, 27 N. J. Eq. 152; Vrooman v. Turner, 69 N. Y. 80; Meech v. Ensign, 44 Amer. Rep. 225, and cases cited; Mellen v. Whipple, 1 Gray, 317; Mason v. Barnard, 36 Mo. 384. The latter case rests upon the construction of a statute which makes an action to foreclose a mortgage a proceeding at law and not in equity.

[2] King v. Whitely, 10 Paige, 465; Garnsey v. Rogers, 47 N. Y. 233.

[3] Burr v. Beers, 24 N. Y. 178; Thorp v. Keokuk Coal Co., 48 N. Y.

had in an action at law.[1] Nor is it essential that any consideration should pass from such third person, or that he should know of it at the time.[2]

It appears to be well settled that a grantee of mortgaged premises, who purchased subject to the mortgage, and by his deed assumed to pay the same to a specified amount as a part of the consideration money, cannot contest the question of the amount unpaid upon the mortgage, where he is not required to pay more than the amount assumed.[3] Nor is he at liberty to show in defense that the mortgage he has assumed, and agreed to pay, was without consideration, and therefore not a valid claim against his grantor; the latter having seen fit to waive any defense he may have had to the mortgage, and having appropriated a portion of the purchase price coming to him to the payment thereof, his grantee is precluded from assailing its validity.[4]

253; Lawrence v. Fox, 20 N. Y. 268; Lamb v. Tucker, 42 Iowa, 118; Ross v. Kennison, 38 Iowa, 396. But see *contra*, King v. Whitely, 10 Paige, 465; Heim v. Vogel, 69 Mo. 529; Fitzgerald v. Barker, 70 Mo. 687.

[1] Burr v. Beers, 24 N. Y. 178; Lamb v. Tucker, 42 Iowa, 118; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Heim v. Vogel, 69 Mo. 529; Fitzgerald v. Barker, 70 Mo. 687; Anthony v. Herman, 14 Kan. 496; Furnas v. Durgin, 119 Mass. 500; Schmucker v. Sibert, 18 Kan. 111; Fenton v. Lord, 128 Mass. 466.

[2] Lawrence v. Fox, 20 N. Y. 268; Thorp v. Keokuk Coal Co., *supra*.

[3] Ritter v. Phillips 53 N. Y. 586.

[4] Crawford v. Edwards, 33 Mich. 355. A vendee, taking the mortgaged premises subject to the lien and payment of the mortgage, cannot set up the defense of usury against such mortgage; neither can any subsequent arrangement between the mortgagor and vendor affect the mortgagee's lien to the full extent conferred by his mortgage. Hartley v. Harrison, 24 N. Y. 170; Frost v. Shaw, 10 Iowa, 491. See *ante*, p. 425, note 1. Such a grantee cannot question the consideration or validity of the mortgage. He is bound for the full amount of the mortgage as expressed in the deed, it being so much of the purchase-money, notwithstanding the fact that a portion, only, of the amount was loaned upon it by the mortgagee. The mortgagee or his assignee is entitled in such case to recover the full amount of the mortgage; and as to the balance over and above the sum actually loaned, he is a trustee for the mortgagor, who is entitled to it as unpaid purchase-money; but the grantee has no interest whatever in the equities between them. Freeman v. Auld, 44 N. Y. 50.

§ 467. **Purchaser of Part of the Mortgaged Property.** —One who purchases a part of the land incumbered by a mortgage, takes it, of course, subject to the mortgage to the extent of the value of the land, and in that proportion he is obliged to contribute ratably to the discharge of the trust deed.[1] But a purchaser of one portion cannot have the mortgage debt made out of the balance to the extent of a payment claimed to have been made by him upon the note secured by the mortgage, when it appears that such payment was no part of the purchase-money, and that it was made a considerable time before his purchase.[2] But the owner of part of the land included in the mortgage made by a former owner, may pay the mortgage, and will be entitled to an account of rents and profits, and to an assignment of the mortgage.[3]

[1] Griffith v. Lovell, 26 Iowa, 226; Hiles v. Coult, 30 N. J. Eq. 40. Unaffected by improvements made. Bates v. Ruddick, 2 Iowa, 423; Aiken v. Gale, 37 N. H. 501; Sawyer v. Lyon, 10 Johns. 32. A late case in Illinois, where the subject is exhaustively discussed by the court, holds, that where a part of mortgaged premises is sold, the unsold portion will be regarded as the primary fund out of which to discharge the mortgage debt, and, until that is exhausted, no part of the purchased premises can be sold for that purpose; and that a purchaser of part of the mortgaged premises cannot redeem that part purchased by him, by paying a just proportion of the mortgage debt. The mortgagee is entitled to retain his lien upon every part of the mortgaged estate, until the whole of his debt is paid. Meacham v. Steele, 93 Ill. 135.

[2] Griffith v. Lovell, 26 Iowa, 226.

[3] Salem v. Edgerly, 33 N. H. 46; Champlin v. Williams, 9 Pa. St. 341.

ARTICLE II.

ASSIGNMENTS OF THE MORTGAGE.

SECTION.

469. Conflicting views in the different States.
470. Assignments under the common-law doctrine.
471. Assignments under the equitable view of a mortgage.
472. Rights and liabilities of assignees.
473. Merger of interests.

§ 469. **Conflicting Views in the Different States.**—The rules and principles governing the assignment of mortgages, bear a close relation to the doctrines of the several States in respect to the nature of the estate or interest conveyed by a mortgage, upon which question, as we have seen, a great diversity exists.[1] It is impossible, therefore, to reduce the rules and decisions of the different States in respect to assignments, to anything like a uniform system. Viewing the interest of the mortgagee as an interest in land, it cannot, under the Statute of Frauds, be assigned without a deed or note in writing, signed by the mortgagee or his agent, or by the act or operation of law. While on the other hand, treating the mortgage title as a mere chattel interest, according to the equitable view, a transfer of the mortgage debt passes the interest of the mortgagee in the land, as completely and effectually as if done by a deed. In Maine and Massachusetts the courts, adhering to the notion that the legal interest of a mortgagee is in the nature of an estate in land, hold that it can only be assigned or transferred by deed, which may either be made by indorsement upon the original mortgage deed, or by a separate instrument.[2] In other States the rigid doctrines

[1] *Ante*, Ch. VIII, Art. II.

[2] Dwinel v. Perley, 32 Me. 197; Lyford v. Ross, 33 Me. 197; Mitchell v. Burnham, 44 Me. 286; Warden v. Adams, 15 Mass. 233; Parsons v. Welles, 17 Mass. 419; Gould v. Newman, 6 Mass. 239; Ruggles v. Barton, 13 Gray. 506.

of the common law have given way in a greater or less degree to the equitable view of the nature of a mortgage; the consequence of which is that in several of the States the doctrine as to assignments is not very clearly defined by the decisions, while in others it is well settled that a transfer of the debt passes the entire interest of the mortgagee.

Without attempting a complete statement of the laws of all the States upon the subject, we will proceed to notice some of the incidents pertaining to assignments of mortgages under these two different theories of the nature of a mortgage interest.

An assignment, it is to be remembered, is governed, as a general rule, by the law of the place where made,[1] in force at the time of the making of such contract.[2] Though where it is regarded as a transfer of real estate, it must, of course, be executed in accordance with the law of the place where the land is situated.

§ 470. **Assignments under the Common-Law Doctrine.**— We have seen that under the common-law doctrine of mortgages the legal title to a mortgage can only be transferred by deed.[3] The assignment must, therefore, be by writing under seal.[4] Although indorsed upon the mortgage, and delivered with it, if not under seal, it conveys only an equitable interest.[5] It must be by deed, and must contain

[1] Bank of England v. Tarleton, 23 Miss. 173; Dundas v. Bowler, 3 McLean, 397. See Hoyt v. Thompson's Executors, 19 N. Y. 207.

[2] Murrell v. Jones, 40 Miss. 565.

[3] *Ante*, § 414.

[4] Den v. Dimon, 10 N. J. L. 156; Smith v. Kelley, 27 Me. 237; Lyford v. Ross, 33 Me. 197; Warden v. Adams, 15 Mass. 233; Adams v. Parker, 12 Gray, 53; Morrison v. Mendenhall, 18 Minn. 232. And see Crinion v. Nelson, 7 Mo. 466.

[5] Adams v. Parker, 12 Gray, 53. And can only be enforced in the name of the mortgagee. Partridge v. Partridge, 38 Pa. St. 78. The assignee of a debt and mortgage, by an assignment not under seal, has but an equitable estate, and therefore cannot be preferred to a release of the mortgage without notice, and for a valuable consideration. Henderson v. Pilgrim, 22 Tex. 464.

granting words sufficient to pass the legal estate,[1] and being in form a conveyance of land, must be acknowledged and recorded,[2] as well as delivered,[3] like any other conveyance. And the general doctrine that a disseizee, without entry and delivery of the deed on the land, cannot convey any title which will be valid as against the disseizor, applies to an assignment of a mortgage the same as to any other transfer of the property.[4] The possession of the mortgagor is the possession of the mortgagee,[5] and consequently a disseizin of the former is a disseizin of the latter, unless the mortgagee's title is expressly recognized by the disseizor.[6]

The object of registration, it is to be remembered, is to give notice of the assignment to subsequent purchasers.[7] It has no effect to charge the mortgagor with notice suffi-

[1] Cottrell v. Adams, 2 Biss. 351; Smith v. Kelley, 27 Me. 237. "The proper technical words of an assignment are 'assign, transfer and set over.' But the words 'give, grant, bargain, and sell,' or any other words, which show the intent of the parties to make a complete transfer, will amount to an assignment." 4 Cruise Dig. 88.

[2] Adams v. Parker, 12 Gray, 53; Mitchell v. Burnham, 44 Me. 302. The title of a mortgagee to land may be conveyed by a deed of release duly executed and recorded, to one who has no notice of a prior unrecorded assignment of the mortgage. Welch v. Priest, 8 Allen, 165.

[3] Rose v. Kimball, 16 N. J. Eq. 185; Rankin v. Major, 9 Iowa, 297. A. executed an assignment of a mortgage, did not deliver it to the assignee, but requested him to have it recorded as soon as A. should die. *Held*, that the assignment was inconsistent with the statute of wills, and therefore a nullity. Shurtleff v. Francis, 118 Mass. 154.

[4] Dadmun v. Lamson, 9 Allen, 85.

[5] Sheridan v. Welch, 8 Allen, 166; Murray v. Blackledge, 71 N. C. 492.

[6] Dadmun v. Lamson, 9 Allen, 85.

[7] As to who are included under this head, see Mills v. Comstock, 5 Johns. Ch. 214; Purdy v. Huntington, 42 N. Y. 334, reversing 46 Barb. 389; Pratt v. Bennington, 10 Vt. 293. The only effect of recording the assignment of a mortgage is to protect the assignee from a subsequent sale of the same mortgage. If the assignment is not recorded, it is void as against a subsequent purchaser of the same mortgage. The provisions of the recording act of New York—declaring every conveyance of real estate void as against a subsequent *bona fide* purchase of the same real estate—do not apply where two mortgages are executed at the same time; as neither one, although first recorded, is a subsequent conveyance. Greene v. Warnick, 61 N. Y. 220.

cient to protect the assignee against a payment made in good faith to the mortgagee, after the assignment.[1] Notice should, therefore, be given directly to the mortgagor or holder of the equity of redeption.[2] Though many circumstances have been held sufficient to charge him with such notice, and to render a payment made to the assignor ineffectual. The mere fact that in making such payment, he fails to require the production of the note or bond, may be sufficient in many cases to raise a presumption of bad faith on his part, or may amount to such a degree of negligence as will make him chargeable with notice of the assignment.[3] It has also been held that a purchaser of the mortgage, who fails to require the production of the note, is chargeable with notice of any defect in the assignor's title thereto.[4]

A mortgage being regarded as a conveyance in fee of real estate, an assignment of it is also a conveyance of real estate to the assignee. It follows, therefore, that an assignment of a mortgage may be made by any form of deed by which any owner of a legal estate can convey it.[5] Although

[1] Wolcott v. Sullivan, 1 Edw. (N. Y.) Ch. 399; Van Keuren v. Corkins, 6 Thomp. & C. 355; James v. Morey, 2 Cow. 296; Reed v. Marble, 10 Paige, 409. But see Vanderkemp v. Shelton, 11 Paige, 28. Where the assignee of a mortgage fails to give notice of the assignment, and so acts as to authorize the mortgagor and his grantees to believe that the assignor is the owner thereof, and they deal with him on that basis, the assignee is estopped from denying the right or authority of the assignor (the mortgagee), whether the money for which the mortgage was originally given was his or not. McCabe v. Farnsworth, 27 Mich. 52.

[2] Actual knowledge must be brought home to him in order to avoid the effect of such payment. Johnson v. Carpenter, 7 Minn. 176; N. Y. Life Ins. Co. v. Smith, 2 Barb. (N. Y.) Ch. 82; Hubbard v. Turner, 2 McLean, 519. See McCabe v. Farnsworth, 27 Mich. 52.

[3] Mitchell v. Cook, 17 How. Pr. 110; Brown v. Blydenburgh, 7 N. Y. 141; Foster v. Beals, 21 N. Y. 247; Doubleday v. Kress, 50 N. Y. 410.

[4] Kellogg v. Smith, 26 N. Y. 18. But where a mortgagee delivered his mortgage to a scrivener, to have an assignment thereof made to B., his creditor, and before the assignment was executed, and while the mortgage was in the scrivener's hands, the mortgagee made an assignment thereof, on a separate paper to C., another creditor, which was recorded before the assignment to B., C. knowing of the proposed assignment to B., C.'s title prevailed. Warden v. Adams, 15 Mass. 233.

[5] Welch v. Priest, 8 Allen, 165. Though a sale on foreclosure is irreg-

it is usual that the assignment is indorsed upon the mortgage, or the mortgage is so attached or referred to as to be constituted a part thereof, it may nevertheless be transferred by separate deed of the land.[1] Nor is it essential that the original mortgage be delivered with the assignment.[2] But to make the assignment effectual, the mortgage debt must be transferred with the legal estate, otherwise the assignee will hold the bare legal estate in trust for the owner of the debt.[3] The mortgage, being merely an incident to the debt, cannot be assigned separately from it, so as to give any beneficial interest.[4] But a transfer of the mortgage will generally pass the debt by implication, unless there are circumstances tending to rebut such presumption.[5] The question, how-

ular, for want of sufficient notice, the conveyance by the mortgagee will operate an assignment of the mortgage. Olmsted v. Elder, 2 Sandf. 325; Moore v. Cord, 14 Wis. 213. An assignment of a mortgage is not a conveyance within the meaning of the Oregon registry act. Watson v. Dundee Mortgage Co., 12 Oreg. 474.

[1] One who becomes the owner of a mortgage is entitled at once to the possession of it, and should require that the assignment contain a precise reference by a description of the property or otherwise, so that the register can identify it and note the assignment in the proper place. If the assignee fails to use due dilligence in this respect, he is liable to have his rights cut off in an action for foreclosure in which he is not joined, brought by a holder of a prior mortgage, who has no notice of such assignee's title to the second mortgage. Moore v. Sloan, 50 Barb. 442.

[2] Warden v. Adams, 15 Mass. 233.

[3] Sanger v. Bancroft, 12 Gray, 367. See Lunt v. Lunt, 71 Me. 377, where it is held that a deed of mortgaged premises, made by the mortgagee, before entry under his mortgage or foreclosure of the same, and not accompanied by an assignment of the mortgage debt or any portion of the same, will not convey any title to the real estate.

[4] Hitchcock v. Merrick, 18 Wis. 357. The assignee can maintain no action upon it, unless he has an interest in the debt secured. Webb v. Flanders, 32 Me. 175; Garroch v. Sherman, 6 N. J. Eq. 219. And see Lunt v. Lunt, *supra*. While most courts hold generally that the transfer of a mortgage, without that of the debt secured by it, is a nullity, the rule should be subject to this qualification, that where the mortgagee has possession, by virtue of his mortgage, or where the mortgagee is not in possession, but the condition has been broken, a conveyance or assignment of the mortgaged premises would be valid to transfer his right to possession. Pickett v. Jones, 63 Mo. 195.

[5] Bulkley v. Chapman, 9 Conn. 5. See Cooper v. Newland, 17 Abb. Pr. 342; Merritt v. Bartholick, 36 N. Y. 44; *s. c.*, 47 Barb. 253; Northamp-

ever, is one of intention, to be determined not only from the words of the deed, but from all the circumstances connected with the particular case. A simple deed of quitclaim will pass the entire interest of the mortgagee when there is no separate obligation for the payment of the debt,[1] or, if the note or bond is delivered with the deed.[2] And it has been held that a warranty deed will even operate as a equitable assignment of a separate debt.[3] But, on the other hand, a transfer of the mortgage debt does not, at law, assign the mortgage.[4] It carries with it only an equitable interest, and has no direct effect upon the legal estate.[5] The mortgage, in such case, can only be enforced by the assignee in the name of the mortgagee,[6] except in those States in which

ton Bank v. Balliet, 8 Watts & S. 311; Fletcher v. Carpenter, 37 Mich. 412; Phillips v. Bank of Lewiston, 18 Pa. St. 394; Pickett v. Jones, 63 Mo. 195.

[1] Barker v. Parker, 4 Pick. 505; Dorkray v. Noble, 8 Me. 278; Cole v. Edgerly, 48 Me. 112; Givan v. Doe, 7 Blackf. 210; Johnson v. Leonards, 68 Me. 237.

[2] Pratt v. Skolfield, 45 Me. 386. The assignment by a mortgagee of his interest, of itself, conveys the right to receive payment on the notes described in the mortgage. An assignment of the notes by indorsement is unnecessary in case of a *bona fide* sale and delivery of them to the assignee; and possession of the notes by him, although necessary to rebut the presumption of payment arising from their absence, is not essential to pass such right. King v. Harrington, 2 Aik. (Vt.) 33.

[3] Welsh v. Phillips, 54 Ala. 309; Ruggles v. Barton, 13 Gray, 506; Lawrence v. Stratton, 6 Cush. 163. But see Wilson v. Troup, 2 Cow. 195; Kilborn v. Robbins, 8 Allen, 472; Hinds v. Ballou, 44 N. H. 621; McSorley v. Larissa, 100 Mass. 270.

[4] Warden v. Adams, 15 Mass. 233; Parsons v. Wells, 17 Mass. 419; Dwinel v. Perley, 32 Me. 197; Warren v. Homestead, 33 Me. 256; Stone v. Locke, 46 Me. 445. A party, to whom one of several promissory notes secured by a mortgage has been indorsed, but no assignment of the mortgage made, may levy on the equity of redemption to satisfy a judgment recovered by him on the note. Andrews v. Fiske, 101 Mass. 422.

[5] Bryant v. Damon, 6 Gray, 564; Young v. Miller, *Id.* 152; Crane v. March, 4 Pick. 131; Cutler v. Haven, 8 *Id.* 490; Warden v. Adams, 15 Mass. 233; Edgerton v. Young, 43 Ill. 464.

[6] Graham v. Newman, 21 Ala. 497. But if the mortgage itself is assigned in proper form, the legal title of the mortgagee passes to his assignee, and proceeding at law to enforce the mortgage must be in the name of the assignee.

the code requires all actions to be brought in the name of the real party in interest. The same is true of any assignment, defective in the formal requisites of its execution.[1]

§ 471. **Under the Equitable View of the Nature of a Mortgage**, a conveyance of the mortgaged premises by the mortgagee, without an assignment or transfer of the mortgage debt, is simply void. The interest of the mortgagee is a mere chattel interest inseparable from the debt.[2] And not being regarded as real estate, it does not require the formalities of a conveyance of real estate for its transfer,[3] but will pass by an assignment of the mortgage debt as fully and effectually as if transferred by deed.[4] The debt is the principal, and the mortgage an incident: and an assignment of the debt is an assignment of the mortgage.[5] This doctrine is practically recognized in most, if not all, of the States: for even where the legal title does not pass, the mortgagee holds it in trust for the owner of the debt, and cannot transfer it to another to be used for a different

[1] Partridge v. Partridge, 38 Pa. St. 78.

[2] Swan v. Yapel, 35 Iowa, 248; Southerin v. Mendum, 5 N. H. 420; Ellison v. Daniels, 11 N. H. 274; Weeks v. Eaton, 15 N. H. 145; Wilson v. Troup, 2 Cow. 195; Jackson v. Willard, 4 Johns. 41; Jackson v. Bronson, 19 Johns. 325; Pope v. Jacobus, 10 Iowa, 262; Sangster v. Love, 11 Iowa, 580; Peters v. Jamestown Bridge Co., 5 Cal. 334; Carter v. Bennett, 4 Fla. 283; Johnson v. Cornett, 29 Ind. 59; Bailey v. Gould, Walk. (Mich.) 178; Bell v. Morse, 6 N. H. 205; Merritt v. Bartholick, 36 N. Y. 44; Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342; Dearborn v. Taylor, 18 N. H. 153; Hobson v. Roles, 20 N. H. 41; Furbush v. Goodwin, 25 N. H. 425; Sims v. Hammond, 33 Iowa, 368; Delano v. Bennett, 90 Ill. 533.

[3] Dougherty v. Randall, 3 Mich. 581. The lien of a mortgage (under the equitable view) is not an estate in land and does not pass by a conveyance of the land alone without the assignment of the debt. Mack v. Wetzler, 39 Cal. 247.

[4] Page v. Pierce, 26 N. H. 317; Southerin v. Mendum, 5 N. H. 420; Smith v. Moore, 11 N. H. 55; Rigney v. Lovejoy, 13 N. H. 247; Blake v. Williams, 36 N. H. 39; Holmes v. McGinty, 44 Miss. 94; Kurtz v. Sponable, 6 Kan. 395; Mulford v. Peterson, 35 N. J. L. 129; Byles v. Tome, 39 Md. 463.

[5] Emanuel v. Hunt, 2 Ala. 190; Cullum v. Erwin, 4 Ala. 452; Graham v. Newman, 21 Ala. 497; Center v. P. & M. Bank, 22 Ala. 743; Ord v. McKee, 5 Cal. 515; Bennett v. Solomon, 6 Cal. 134; Crow v. Vance, 4 Iowa, 434; Bank of Indiana v. Anderson, 14 Iowa, 544; McClure v.

purpose.[1] Perhaps the most difficult and important question, involved in the distinction between these two thories, is that which arises upon a discharge of the mortgage

Burnes, 16 Iowa, 591; Cornog v. Fuller, 30 Iowa, 212; Bowling v. Cook, 39 Iowa, 200; Vandercook v. Baker, 48 Iowa, 199; Lucas v. Harris, 20 Ill. 165; Vansant v. Allmon, 23 Ill. 30; Pardee v. Lindley, 31 Ill. 174; Mapps v. Sharpe, 32 Ill. 13; Garrett v. Packett, 15 Ind. 485; Blair v. Bass, 4 Blackf. (Ind.) 539; Croft v. Bunster, 9 Wis. 503; Miles v. Gray, 4 B. Mon. (Ky.) 417; Burdett v. Clay, 8 *Id.* 287; Scott v. Turner, 15 La. Ann. 346; Cooper v. Ulmann, Walk. (Mich.) 251; Briggs v. Hannowald, 35 Mich. 476; Martin V. McReynolds, 6 Mich. 70; Nelson v. Ferris, 30 Mich. 497; Dick v. Mowry, 17 Miss. 448; Lewis v. Starke, 18 Miss. 120; Laberge v. Chauvin, 2 Mo. 179; Chappell v. Allen, 38 Mo. 213; Potter v. Stevens, 40 Mo. 229; Whittemore v. Gibbs, 24 N. H. 484; Downer v. Button, 26 N. H. 338; Johnson v. Hart, 3 Johns. Ch. 322; Lawrence v. Knapp, 1 Root (Conn.), 248; Jackson v. Blodgett, 5 Cow. 202; Hyman v. Devereux, 63 N. C. 624; Paine v. French, 4 Ohio, 318; Perkins v. Sterne, 23 Tex. 561; Langdon v. Keith, 9 Vt. 299; Fisher v. Otis, 3 Chand. (Wis.) 83; Martineau v. McCollum, 4 *Id.* 153; Hagerman v. Sutton (Mo.), 4 S. W. Rep. 73; Kuhns v. Bankes, 15 Neb. 92; Bell v. Simpson 75 Mo. 485; O'Neil v. Seixas (Ala.), 4 South Rep. 745; Conn. M. L. I. Co. v. Talbot, 113 Ind. 373. As to the law of Georgia see Winstead v. Bingham, 14 Fed. Rep. 1. And an assignment of part of the debt carries the security *pro tanto*. Phelan v. Olney, 6 Cal. 478; Anderson v. Baumgartner, 27 Mo. 80; Stevenson v. Black, 1 N. J. Eq. 338; Johnson v. Brown, 31 N. H. 405; Swartz v. Leist, 13 Ohio St. 419; Gower v. Howe, 20 Ind. 396; Keyes v. Wood, 21 Vt. 331; Herring v. Woodhull, 29 Ill. 92. The holders of the notes first maturing are entitled to be paid first from the proceeds of the mortgaged property. Walker v. Schreiber, 47 Iowa, 529.

[1] Welsh v. Goodwin, 123 Mass. 71; Jordan v. Cheney, 74 Me. 359; Morris v. Bacon, 123 Mass. 58. In the latter case, A. made a promissory note payable to the order of B. and executed to him a mortgage of land as security therefor, which was duly recorded. B. indorsed the note to C., and afterwards assigned the mortgage to D., and delivered to him another note similar in terms to the one described in the mortgage. Both C. and D. acted in good faith, and each paid a valuable consideration to B. *Held*, that C. was entitled in equity to an assignment of the mortgage from D. But the assignee, having only an equitable assignment of the mortgage, cannot maintain ejectment. Kilgour v. Gockley, 83 Ill. 109. Nor a writ of entry. Dwinel v. Perley, 32 Me 197; Young v. Miller, 6 Gray, 152; Bryant v. Damon, *Id.* 564; Gould v. Newman, 6 Mass. 239; Warden v. Adams, 15 Mass. 232. And where the mortgagee has possession, by virtue of his mortgage, or where he has the right to possession, a conveyance of the mortgaged premises would be valid to transfer that right. Pickett v. Jones, 63 Mo. 195.

entered by the mortgagee, after an assignment of the debt, as between the assignee and a *bona fide* purchaser of the mortgaged premises, without notice of the assignment. Where the interest of the mortgagee is regarded as an estate in land, and a transfer of that interest a conveyance of real estate within the meaning of the recording acts, the question is relieved of much of its difficulty. In such case the record of an assignment duly made is notice to all the world, except the mortgagor, his heirs and personal representatives: and a failure to record the assignment would, of course, postpone the rights of the assignee to those of a purchaser without notice.[1] And in case of a transfer of the debt without a formal assignment of the mortgage, the mortgagee being a trustee of the legal estate, a discharge of the mortgage entered by him would be effectual, and binding upon his assignee, in favor of a party acting in good faith, and without notice of the equitable rights of the assignee. On the other hand, the interest of a mortgagee being regarded as a mere chattel interest, which will pass by a transfer of the debt, an assignment of such interest is not a conveyance or assignment of real estate, and consequently is not, in general, within the language of the recording acts.[2] And a mortgagee, having parted with his interest in the security by a transfer of the debt, cannot discharge the mortgaged premises from the lien of the mortgage.[3] It follows, therefore, under this view of the law, that an assignment made for a valuable consideration would be good as against a subsequent *bona fide* purchaser,

[1] Ely v. Scofield, 35 Barb. 330; Henderson v. Pilgrim, 22 Tex. 464.

[2] Mott v. Clark, 9 Pa. St. 399; Goff v. Denny, 2 Phila. 275; Pratt v. Bank of Bennington, 10 Vt. 293; Hoyt v. Hoyt, 8 Bosw. (N. Y.) 511. But see Phillips v. Bank of Lewiston, 18 Pa. St. 394. The equitable assignment of a mortgage, (*i. e.*, by the transfer of the mortgage debt,) need not be recorded to entitle the assignee thereof to the mortgage lien as against a subsequent assignee of the mortgage, claiming under an assignment executed and recorded. Byles v. Tome, 39 Md. 461.

[3] McCormick v. Digby, 8 Blackf. 99; Vandercook v. Baker, 48 Iowa, 199; Gordon v. Mulhare, 13 Wis. 22.

although the assignment be not recorded.[1] These are the legitimate conclusions to which the two different views of the nature of a mortgage lead. But they have not always been followed in the course of decision in the different States. In some of the States an assignment has been held to be within the language of the recording acts, where the interest of the mortgagee is regarded so little like an estate in land as to pass by a transfer of the mortgage debt.[2]

§ 472. **Rights and Liabilities of Assignees.**[3]—The question of how far the assignee of a mortgage is bound by the actual state of the account between the mortgagee and mortgagor, or in other words, whether he may claim what appears to be due upon the face of the mortgage, or only what is really due, after deducting all payments and offsets, is one that has been much discussed and upon which the authorities are by no means uniform. The general rule is, that the assignee takes the mortgage, subject to all the equities between the original parties, especially if he has been guilty of negligence, or circumstances exist which would tend to put him upon inquiry as to the rights of the mortgagor.[4] The rule rests upon the doctrine of the com-

[1] Wilson v. Kimball, 27 N. H. 300. But see Conn. M. L. I. Co. v. Talbot, 113 Ind. 373.

[2] Phillips v. Bank of Lewiston, 18 Pa. St. 394. See Givan v. Doe, 7 Blackf. 210; Williams v. Birbeck, 1 Hoff. Ch. 369; Fort v. Burch, 5 Denio, 187; Henderson v. Pilgrim, 22 Tex. 464; Fosdick v. Barr, 3 Ohio St. 471; Swartz v. Leist, 13 Ohio St. 419.

[3] See 22 Cent. L. J. 130, for an interesting discussion of this question.

[4] Johnson v. Carpenter, 7 Minn. 176; Burbank v. Warwick, 52 Iowa, 493; Bouligny v. Fortier, 17 La. Ann. 121; Crane v. Turner, 67 N. Y. 437; Nichols v. Lee, 10 Mich. 526; Kamena v. Huelbig, 23 N. J. Eq. 78; Dunn v. Seymour, 11 N. J. Eq. 278; Cumberland Coal & Iron Co. v. Parish, 42 Md. 598; Andrews v. Torrey, 14 N. J. Eq. 355; Union Nat. Bank v. Pinner, 25 N. J. Eq. 495; Hartley v. Tatham, 10 Bosw. (N. Y.) 273; Twitchell v. McMutrie, 77 Pa. St. 383; Williams v. Love, 2 Head, 80; Wood v. Thomas, *Id.* 160; Vredenburgh v. Burnet, 31 N. J. Eq. 229; Earnest v. Hoskine, 100 Pa. St. 551; Moffat v. Hardin, 22 S. C. 9; Briggs v. Langford (N. Y.), 14 N. E. Rep. 502. And see Godeffroy v. Caldwell, 2 Cal. 489. The assignee of a mortgage is affected by facts invalidating the acknowledgement of the mortgage, if he takes it without inquiry of the mortgagor, a married woman, if there was any defense.

mon law that a mortgage, so far as it is a debt, or a security for a debt, is a chose in action and not assignable; and that the assignee should stand no better in equity than in law.[1] But where the mortgage note is negotiable in form, it is, of course, assignable by indorsement; and the debt, being the principal thing, imparts its character to the mortgage, which is only an incident. This is the doctrine recognized in a majority of the States. In such States the assignee of a mortgage securing a negotiable note, who takes it in good faith before maturity, takes it free from any equities existing between the original parties.[2] But the rule, it is to be remembered, applies to such mortgages only as are collateral to negotiable notes.[3] A bond not being a negotiable instru-

McCandless v. Engle, 51 Pa. St. 309. So, fraud in procuring a note and mortgage may be set up against the assignee in an action upon them, as well as against the person to whom they were made. Marshall v. Billingsley, 7 Ind. 250; Farmers' Bank v. Douglass, 11 Smed. & M. 469; Danbury v. Robinson, 14 N. J. Eq. 213; Chamberlain v. Barnes, 26 Barb. 160. But a mortgagor who has paid nothing can claim no equities, as against the assignee of the mortgage, by reason of payment made by his grantee of the equity of redemption to the mortgagee, who had, under a pretended claim of right, wrongfully obtained possession of the securities from a bailee of the assignee. Chase v. Brown, 32 Mich. 225. The rule, that the assignee of a mortgage takes it subject to equities, does not embrace equities or defenses springing from defaults or even fraud of the assignor, committed subsequent to the assignment, and which had no existence, and were simply possibilities at the time of the assignment. Bush v. Cushman, 27 N. J. Eq. 131. A mortgagor who has enabled the mortgagee to sell the property by furnishing a certificate that he knows of no offset to it, on the faith of which an innocent purchaser has paid value for the mortgage, will not be allowed to set up an offset between him and the mortgagee against the purchaser. Weil v. Fischer, 42 N. Y. Superior Court, 32. The assignee takes it subject to all equities between the mortgagor and mortgagee, but not to those between the mortgagor and a prior assignee. Reineman v. Robb, 98 Pa. St. 474.

[1] Matthews v. Wallwyn, 4 Ves. 118. See Carpenter v. Longan, 16 Wall. 271.

[2] Carpenter v. Longan, 16 Wall. 271; Reeves v. Scully, Walk. (Mich.) Ch. 248; Dutton v. Ives, 5 Mich. 515; Bloomer v. Henderson, 8 Mich. 395; Taylor v. Page, 6 Allen, 86; Sprague v. Graham, 38 Me. 328; Pierce v. Faunce, 47 Me. 507.

[3] Reeves v. Scully, Walk. Ch. 248; Russell v. White, *Id.* 31; Nichols

ment, an assignee of a bond and mortgage takes them subject to the equities with which they were charged in the hands of the original holder.[1] So, the transfer of a mortgage note overdue, subjects it to the same equities as if it were not secured by mortgage.[2] In some of the States the doctrine is established that the mortgage, not being assignable at law, follows the note only in equity, and that the assignee, having to resort to equity to enforce his rights, is compelled to do equity by allowing the mortgagor all the rights of defense that he had against the mortgagee.[3] This is the doctrine recognized by the courts of Illinois, Ohio, and Oregon, in which States the assignee of a mortgage, given to secure a negotiable promissory note, takes it subject to the existing equities of the mortgagor, although the assignee may have purchased the note in good faith, for a valuable consideration and before maturity.[4] In a late case in Illinois the court says: "It is the well-settled doctrine of this court, that the privilege of exemption from defense, which belongs to a negotiable promissory note in the hands of an innocent holder for value, taking it before maturity, does not attach to a mortgage given to secure the payment of the note; that he takes the mortgage subject to the existing equities of the mortgagor; and that as respects the mortgage, the mortgagor may make the same defense against such a holder of the note as against the mortgagee himself."[5]

v. Lee, 10 Mich. 526; Jones v. Smith, 22 Mich. 360; Mott v. Clark, 9 Pa. St. 399; Pryor v. Wood, 31 Pa. St. 142; Twitchell v. McMutrie, 77 Pa. St. 383; Croft v. Bunster, 9 Wis. 504; Gould v. Bunster, 9 Wis. 513; Cornish v. Bryan, 10 N. J. Eq. 146; Losey v. Simpson, 11 N. J. Eq. 246; Musgrove v. Kennell, 23 N. J. Eq. 75; Clute v. Robison, 2 Johns. 595; Niagara Bank v. Rosevelt, 9 Cow. 409; Ingraham v. Disborough, 47 N. Y. 421; Trustees of Union College v. Wheeler, 61 N. Y. 88.

[1] Crane v. March, 4 Pick. 131; Strong v. Jackson, 123 Mass. 60.

[2] Howard v. Gresham, 27 Ga. 347; Fish v. French, 15 Gray, 520.

[3] See Hostetter v. Alexander, 22 Minn. 559; Bouligny v. Fortier, 17 La. Ann. 121.

[4] Olds v. Cummings, 31 Ill. 192; Walker v. Dement, 42 Ill. 273; Baily v. Smith, 14 Ohio St. 396; Corbett v. Woodward, 11 Chicago L. N. 246.

[5] Bryan v. Vix, 83 Ill. 11.

Whether the rule that the assignee of a mortgage, having the character of a chose in action, takes it subject to subsisting equities between the parties, is limited to equities between the original parties, or extends to those of third persons, is a question upon which the authorities are not agreed. In New York it appears to be the settled doctrine of the later cases that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses, and, therefore, that the assignee takes the security subject to all the equities that third persons could enforce against the assignor, as well as to those existing between the parties to the instrument.[1] But in other States, and according to the earlier cases in New York, the rule extends no further than to the equities residing in the original obligor. To subject the assignee to the latent equity of a third person, he must have notice thereof, either express or constructive, at the time of the assignment.[2]

[1] Bush v. Lathrop, 22 N. Y. 535; Greene v. Warnick, 64 N. Y. 220; Schafer v. Reilly, 50 N. Y. 61; Trustee Union College v. Wheeler, 61 N. Y. 88. The doctrine is, however, qualified to the extent that "a *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto." Moore v. Metropolitan National Bank, 55 N. Y. 41.

[2] Losey v. Simpson, 11 N. J. Eq. 246; Vredenburgh v. Burnet, 31 N. J. Eq. 231; Glidden v. Hunt, 24 Pick. 221; N. Y. Chem. Mnf'g. Co. v. Peck, 6 N. J. Eq. 37; James v. Morey, 2 Cow. 246; Rosevelt v. Bank of Niagara, Hopk. (N. Y.) 579; Peters v. Jamestown Bridge, 5 Cal. 334; Russell v. Waite, Walk. (Mich.) 31; Clute v. Robison, 2 Johns. 595; Mott v. Clark, 9 Pa. St. 399; Pryor v. Wood, 31 *Id.* 142; Clark v. Flint, 22 Pick. 231; Bach v. Abbott, 6 La. Ann. 809; Cicotte v. Gagnier, 2 Mich. 381; Bloomer v. Henderson, 8 Mich. 395; Danbury v. Robison, 14 N. J. Eq. 213. The assignee of a mortgage takes it subject to all equities existing in favor of the mortgagor against the mortgagee, but not to the latent equities of the mortgagor's creditors. If a *bona fide* purchaser for value without notice, he holds the mortgage discharged of all equities of the creditors. But it is otherwise if he take without paying value, or with notice of the invalidity of the mortgage. Hovey v. Hill, 3 Lans. 167. When a mortgagee is responsible for a breach of trust committed by the mortgagor, his assignee, with notice, is subject to the

While the assignee of a mortgage, with the exceptions heretofore noted, acquires no greater rights or interest than were vested in his assignor, he will by an assignment in due form acquire all such rights and privileges as his assignor was entitled to under the mortgage.[1] He is accordingly entitled to use all the remedies which the assignor might have used, to enforce the lien of the mortgage against the debtor.[2] Nor can the mortgagor raise any question upon the consideration of the assignment. Whether the assignment was a valid consideration is of no concern to him, except it be to make available a claim to set-off or payment.[3]

same equity in enforcing the mortgage. Matthews v. Heyward, 2 S. C. 239. One who purchases a mortgage with knowledge of facts which should put him on inquiry, will be deemed to have purchased with knowledge of any fact which renders the sale of the mortgage fraudulent and void. And it will be no protection to him that he paid full consideration for such mortgage. Tantum v. Green, 21 N. J. Eq. 364.

[1] The assignment of a debt and mortgage is an assignment not only of the claim against the mortgagor, but of all the securities which the assignor holds against the mortgagor or other parties for the same debt. Phillips v. Bank of Lewiston, 18 Pa. St. 394. But the assignment does not carry with it a separate contract of guaranty. Smith v. Starr, 4 Hun (N. Y.), 123.

[2] Crow v. Vance, 4 Iowa, 434; Williams v. Moraney, 3 La. Ann. 227. The purchaser of a debt and the mortgage by which it is secured, has a right to the possession of the property. Smith v. Porter, 35 Me. 287. The possession of the mortgagor, continuing by the mortgagor's permission, is to be considered the possession of the mortgagee; so that where the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner. Chapman v. Armistead, 4 Munf. (Va.) 382. See Jackson v. Minkler, 10 Johns. 480.

[3] Adair v. Adair, 5 Mich. 204; Lovett v. Dimond, 4 Edw. Ch. 22. A mortgagor cannot assail the assignment of a mortgage by the administrator of the estate of the mortgagee on the ground that it was made for less than its value, since payment to such assignor will be valid. Knox v. Galligan, 21 Wis. 470. A mortgage valid in its origin will not be invalidated by a subsequent usurious transfer; notwithstanding the assignee may be liable to his assignor for usury taken, the mortgage itself remains a valid security against the mortgagor and the mortgage property. Pearsall v. Kingsland, 3 Edw. (N. Y.) Ch. 195; Warner v. Gouverneur, 1 Barb. 36. Where A. makes a conveyance which is fraudulent and void as to creditors and takes a mortgage back, the assignees

After a mortgage has been assigned, and the mortgagor has notice of the assignment, he is bound to protect the rights of the assignee. It is not material in what manner the knowledge of the transfer was acquired by the debtor; any transaction between him and the original mortgagee in reference to the mortgage debt, after such notice, will not affect the rights of the assignee.[1] As to any payments made by the mortgagor to the original mortgagee in good faith, without notice of the assignment of the mortgage, the only remedy of the mortgagee is against the assignor.[2] Although there is no implied warranty in the assignment of a mortgage, as to the solvency of the mortgagor,[3] nor as to the amount due upon the mortgage, yet, if the notes have in fact been paid to him, the assignor is liable for the consideration received by him for the transfer.[4] So, if the mortgagee is induced to acknowledge satisfaction of the mortgage which he had assigned, whereby the security is overreached by an intermediate incumbrance, he is liable

of the mortgage and of the equity of redemption stand in the same position as the original parties. The owner of the equity of redemption cannot set up the defense to the mortgage which a creditor might have set up. Sprague v. Graham, 29 Me. 160.

[1] Philips v. Bank of Lewiston, 18 Pa. St. 394.

[2] Although a mortgage is assigned, the mortgagor, without actual or constructive notice, is entitled to deal with the mortgagee or his personal representatives, and the assignee will be bound by such dealings unless the mortgage was given to secure negotiable paper, and was transferred before it was due. Jones v. Smith, 22 Mich. 360. A mortgage "payable in five years" was, at the request of the mortgagor, assigned as collateral security for the payment of certain promissory notes held against him by the assignee, and the assignee assigned it to another, of which last transfer no notice was given to the mortgagor, until after the mortgage had been paid off, and the notes taken up. *Held*, that such payment was a defense to a subsequent action upon the mortgage by the last assignee, although made before the expiration of five years. Horstman v. Gerker, 49 Pa. St. 282.

[3] The assignee of a mortgage cannot hold the mortgagee liable for any deficit remaining unsatisfied after sale of the mortgaged premises, unless the mortgagee has indorsed the mortgage note. Wood v. Sands, 4 G. Green (Iowa), 214.

[4] French v. Turner, 15 Ind. 59.

to make reparation to the assignee.[1] So, one who has in good faith assigned a mortgage, is estopped at law, as well as in equity, from setting up a prior and conflicting title in himself to defeat the mortgage.[2]

§ 473. **Merger of Interests.**—It is a question of frequent occurence, whether, under the particular circumstances of a case, the transfer of a mortgage shall be considered an assignment, by which the mortgage is preserved as a lien or incumbrance upon the land, or as a discharge or extinguishment, which relieves the land from the incumbrance of the mortgage, and lets in other, and previously posterior claims, upon the principal that equitable titles merge in the legal title, where both become vested in the same person. The cases under this head are numerous and somewhat difficult to be reduced to any set principles, depending, as they do, upon the particular and varying circumstances of each case.[3] It is a general rule that when the legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession:[4]

[1] Ferris v. Hendrickson, 1 Edw. (N. Y.) Ch. 132.

[2] Rogers v. Cross, 3 Chand. (Wis.) 34.

[3] See 16 Cent. L. J. 247; 17 *Id.* 402.

[4] But when a mortgagee acquires the equity of redemption in the mortgaged property, it does not follow as a necessary consequence that the mortgage becomes merged and extinguished. A person becoming entitled to an estate, subject to a charge for his own benefit, may, if he elect so to do, and manifest such election, take the estate and keep up the charge. A court of equity will sometimes hold a charge extinguished when, by the strict rules governing the subject at law, it would be regarded as subsisting; and sometimes preserve it where, at law, it would be merged; the question being as to the intention, actual or presumed, of the person in whom the interests are united, founded upon the reason or necessity of the case. Polk v. Reynolds, 31 Md. 106. Thus a purchaser of land conveyed to him by deed, subject to a mortgage, by which deed it is provided that he shall assume the payment of the mortgage as part of the consideration, and who actually pays the mortgage and takes an assignment thereof in blank at the time of the payment, the mortgage remaining unsatisfied and uncanceled of record, may reissue such mortgage in payment of a debt to a creditor by filling up the blank in the assignment with the name of his creditor, and a subsequent purchaser from him with warranty will be bound by the mortgage. Kellogg v. Ames, 41 N. Y. 259.

but if there be an intervening right between the mortgage and the equity of redemption, there is no merger.[1] And, in order to constitute merger, the legal and the equitable estate must unite in one and the same person.[2] Thus a conveyance of the mortgaged premises to the mortgagee by the mortgagor after an assignment of the mortgage to a third party does not work a merger of the mortgage.[3] And payment of the mortgage debt by one having an interest to protect, will, if justice require, operate as an assignment.[4] The intention, however, of the person in whom the interests are united is to be regarded, and in equity that intention is the governing principle of the rule.[5] In the absence

[1] Evans v. Kimball, 1 Allen, 240; Cook v. Brightly, 46 Pa. St. 439. Where a homestead mortgage is purchased by one who owns the equity of redemption, subject to the debtor's homestead right in the equity, the mortgage is not merged but is upheld for the security of the purchaser. Fellows v. Dow, 58 N. H. 21.

[2] Though under the common law it may be true that the assignment of the mortgage to the wife of the mortgagor effected a merger, yet such is not the result under statutes authorizing married women to buy, sell and own property. Bean v. Boothby, 57 Me. 302. If there be two owners of the equity of redemption, and the mortgage be conveyed or assigned to one of them, it is not discharged, but may be foreclosed by the assignee as against his co-tenant. Barker v. Flood, 103 Mass. 474.

[3] Nor does a subsequent conveyance by the mortgagee, although recorded before the assignment, operate as a transfer of the previously recorded mortgage within the recording acts. Purdy v. Huntington, 42 N. Y. 334.

[4] Bacon v. Goodnow, 59 N. H. 415.

[5] 4 Kent's Com. 102; Waugh v. Riley, 8 Metc. 290; Richardson v. Hockenhull, 85 Ill. 124; Hutchins v. Carleton, 19 N. H. 487; N. E. Jewelry Co. v. Merriam, 2 Allen, 390; Bell v. Tenny, 29 Ohio St. 240; Huebsch v. Scheel, 81 Ill. 281; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Patterson v. Mills, 69 Iowa, 755; Smith v. Roberts, 91 N. Y. 470; Rumpp v. Gerkense, 59 Cal. 496; Watson v. Dundee Mortgage Co., 12 Oreg. 474; Hospes v. Almstedt, 83 Mo. 473; Smith v. Swan, 69 Iowa, 412; Bleckley v. Branyan (S. C.), 2 S. E. Rep. 319. In the absence of a special agreement to that effect, the taking of a new mortgage from the same party and on the same property, will not merge or extinguish a prior mortgage. Christian v. Newberry, 61 Mo. 446. The acceptance of the legal title by a mortgagee does not work a merger where none is intended, and it is against the interest of the purchaser. Wickersham v. Reeves, 1 Iowa, 413; Mallory v. Hitchcock, 29 Conn. 127; Knowles v. Lawton, 18

of evidence to the contrary his intention will be presumed to correspond with his interest.[1] And even where the intention appears to have been to discharge the mortgage, a court of equity will consider it as subsisting, if the purposes of justice require it.[2] And, on the other hand, it may be laid down as true, that where a mortgage has been

Ga. 476; Freeman v. Paul, 3 Me. 260; Decatur v. Walker, 137 Mass. 141; Boardman v. Larrabee, 51 Conn. 39.

[1] Tower v. Divine, 37 Mich. 443; Grover v. Thatcher, 4 Gray, 526; Mulford v. Peterson, 35 N. J. L. 127; Evans v. Kimball, 1 Allen, 240; Edgerton v. Young, 43 Ill. 464; Vanderkemp v. Shelton, 11 Paige, 28; James v. Morey, 2 Cow. 246; Grellet v. Heilshorn, 4 Nev. 526; Shinn v. Fredericks, 56 Ill. 443; Duncan v. Drury, 9 Pa. St. 332; Stantons v. Thompson, 49 N. H. 272; Myers v. Brownell, 1 D. Chip. (Vt.) 448; Lyon v. McIlvaine, 24 Iowa. 12; Woodward v. Davis, 53 Iowa, 694. It has long been the practice in courts of equity to hold the legal and equitable title distinct, although both have become vested in the same person, when it can be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And when the nature of the case shows that such severance of the legal and equitable title is evidently to the interest of the holder, such intention will be presumed. Besser v. Hawthorn, 3 Oreg. 129. The application of the rule that when a mortgage and an equity of redemption become vested in the same party, his intention to extinguish or not to extinguish the mortgage, will, in the absence of evidence to the contrary, be presumed to correspond with his interest, is not affected by the fact that the mortgage includes other estates, of which the mortgagee is not the owner of the equity of redemption. Knowles v. Carpenter, 8 R. I. 548. Where a mortgage is given upon land to secure the payment of several notes, maturing at different times, and a foreclosure and sale is had for a part of the notes, leaving one note unpaid, and the holder of the unpaid note becomes the purchaser of the mortgaged premises, and receives a master's deed, the legal and equitable title to the premises will be merged, and it will operate as a satisfaction of the mortgage and the remaining indebtedness, for the reason that the purchaser in such a case is presumed to have bought the land at its value, less the unpaid note. Robins v. Swain, 68 Ill. 197.

[2] Stantons v. Thompson, 49 N. H. 272; Hinchman v. Emans, 1 N. J. Eq. 100; Edgerton v. Young, 43 Ill. 464; Lyon v. McIlvane, 24 Iowa, 9; First National Bank v. Elmore, 52 Iowa, 541; Starr v. Ellis, 6 Johns. Ch. 393; Aiken v. Milwaukee, etc. R. Co., 37 Wis. 469; Wallace v Blair, 1 Grant's Cas. 75; Lilly v. Palmer, 51 Ill. 331; Simonton v. Gray, 34 Me. 50; Beau v. Boothby, 57 Me. 303; McClain v. Sullivan, 85 Ind. 174; Guekian v. Riley, 135 Mass. 71; Ann Arbor Sav. Bank v. Webb, 56 Mich. 377; Haulon v. Doherty (Ind.), 9 N. E. Rep. 782.

substantially satisfied, it will never be kept alive by equity to aid in perpetrating a fraud through the forms of law, but only for the advancement of justice.[1]

[1] McGiven v. Wheelock, 7 Barb. 22; Hutchins v. Carleton, 19 N. H. 487; Webb v. Meloy, 32 Wis. 232; 2 Washb. on Real Prop., 4th ed., 197. The owner of lands who treats a mortgage upon the same, which has been assigned to him, as a valid instrument, and transfers it as such, is estopped from insisting as against the assignee or any one claiming under him, that in his hands it had been merged and disappeared in the fee. Powell v. Smith, 30 Mich. 451.

CHAPTER XI.—Redemption, Payment and Discharge.

ARTICLE I. Redemption.
II. Payment.
III. Discharge.

ARTICLE I.

REDEMPTION.

SECTION.
476. Of the right to redeem.
477. When this right is barred.
478. Who may redeem.
479. The sum payable to effect redemption.
480. Of the mortgagee's liability to account.
481. Contribution to redeem.

§ 476. **Of the Right to Redeem.**—We have seen, in a former chapter, that the right of redemption attaches to a mortgage as a necessary incident; and that this right is the creature of the law, and exists independent of, and despite the contract of the parties.[1] As soon as the estate, under

[1] *Ante*, § 415; Quartermous v. Kennedy, 29 Ark. 544. A waiver of the equity of redemption, contemporaneous with the mortgage, and even if emboded in it, will not be enforced; nor will it be if made afterwards, unless in writing and sustained by a consideration and attended by a transfer, either by grant or on principle of estoppel, of the mortgagor's interest to the mortgagee. Peugh v. Davis, 96 U. S. 332. And see Fierson v. Blanton, 57 Tenn. 272. An agreement between a mortgagor

a strict interpretation of the language of the instrument, has become forfeited at law, the right of redemption attaches in equity. No such right exists until the mortgage has become due:[1] and until the day for payment fixed by the mortgage is passed, the debtor is invested with no special equities.[2] He may perform the condition of the mortgage according to its proviso, and thus avoid the conveyance at law. But after the day of payment has passed, a special equity arises for redemption, which attaches to the estate until barred, either by the act of the mortgagor, the lapse of time, or by a foreclosure in the manner prescribed by law.[3] In some of the States a period is allowed by statute for redemption after a foreclosure sale. It is not our purpose to notice these special statutory enactments here.[4]

§ 477. **When the Right of Redemption is Barred.**—The right of redemption may be barred, as has been said, either by the act of the mortgagor, the lapse of time, or by a foreclosure duly had. The first mentioned subjects only are to be noticed here; the latter will be considered in a future chapter.

The mortgagor's equity of redemption may of course be

and mortgagee, for the purchase by the latter of the right of redemption, is looked upon with jealousy by courts of equity, and will be sustained only when in all respects fair and for an adequate consideration. Odell v. Montross, 68 N. Y. 499. When the Circuit Court adjudged the sale of mortgaged lands in Illinois and entered a decree forever barring the right of redemption. Held, that the mortgagor nevertheless had the right to redeem within the statutory time. Mason v. Northwestern Ins. Co., 106 U. S. 163. In Washington Territory there is no equity of redemption. The mortgagor's equities must be fixed by the court in its decree in the foreclosure suit. Parker v. Dacres, 2 Wash. 439.

[1] Abbe v. Goodwin, 7 Conn. 377; Shield v. Lozear, 22 N. J. Eq. 447. Either in the mortgagor or a purchaser from him. Hoag v. Rathbun, 1 Clark (N. Y.), 12. Except the time of payment has been changed by subsequent agreement. Scott v. Frink, 53 Barb. 533.

[2] Brown v. Cole, 14 Sim. 427. Until conditions broken the rights of the parties are legal, and not equitable. Erskine v. Townsend, 2 Mass. 493.

[3] See Winton's Appeal, 87 Pa. St. 77.

[4] See Stimson's Amer. Stat. §§ 1943, 1944.

barred by a release of the mortgaged premises duly executed by him to the mortgagee. He may also be estopped by joining the mortgagee in a sale of the premises,[1] or by encouraging a person to purchase the mortgage by a promise not to redeem.[2] Though such a promise made to the mortgagee, at the time of the execution of the mortgage, or under circumstances of oppression, would be void.[3]

As before stated, the right of redemption may also be barred by the lapse of time.[4] In general, where there is a statute bar at law, courts of equity, by analogy or in obedience to the statute, adopt the same period of limitation as a bar to equitable claims. By the statute of 21 Jac. 1, ch. 16, twenty years' possession by the mortgagee without any account of acknowledgment of a subsisting mortgage, is a bar to the right of entry at law, unless the mortgagor is within some of the exceptions made for disabilities. By analogy to that statute the same period has been adopted as the common-law limitation, beyond which the mortgagor shall not be allowed to redeem[5]—unless he can bring himself within the proviso of the statute, the construction of which is the same in equity as at law.[6] The Statute of Limitations does not strictly constitute a bar to a bill to redeem; but equity adopts the statutory period as the same time at which the presumption arises, that the mortgagor

[1] Wright v. Whithead, 11 Vt. 268.

[2] Fay v. Valentine, 12 Pick. 40.

[3] *Ante*, § 415; Batty v. Snook, 5 Mich. 231.

[4] The right of redemption is not lost by lapse of time when the mortgagor remains in possession and occupies for himself and not for the mortgagee. Bird v. Keller, 77 Me. 270.

[5] Barron v. Martin, 19 Ves. 327; Ayres v. Waite, 10 Cush. 72; Slicer v. Bank of Pittsburg, 16 How. 571; Hughes v. Edwards, 9 Wheat. 489; Bates v. Conrow, 11 N. J. Eq. 137; Demarest v. Wynkoop, 3 Johns. Ch. 129, and cases cited; Gunn v. Brantley, 21 Ala. 633; Phillips v. Sinclair, 20 Me. 269; McNair v. Lot, 34 Mo. 285; Cook v. Finkler, 9 Mich. 131; Hallesy v. Jackson, 66 Ill. 139; Knowlton v. Walker, 13 Wis. 264; Montgomery v. Chadwick, 7 Iowa. 114; Randall v. Bradley, 65 Me. 43; Roberts v. Littlefield, 48 Me. 61; Morgan v. Morgan, 10 Ga. 297; Clark v. Potter, 32 Ohio St. 49.

[6] Demarest v. Wynkoop, 3 Johns. Ch. 129.

has abandoned his right.[1] In those States in which the time of limitation, within which an entry may be made, has been changed by statute, the time for redemption, following the analogy, would conform to the statute in force. Thus, in Connecticut, where the limitation is fifteen years, it is held that the presumption will arise upon fifteen years' undisturbed possession by the mortgagor, without payment or recognition of the mortgaged debt.[2] The right to foreclose and the right to redeem being mutual and reciprocal, the latter is barred whenever the former would be, and not before;[3] except in those States in which special statutes have been enacted governing the redemption of mortgages.[4]

A contract extending the time of redemption beyond the time limited by the statute will be enforced, and a redemption allowed within the time designated in the contract.[5]

§ 478. **Who may Redeem.**—The right of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives and assigns, or any one who has an interest in or a lien upon the estate, provided he comes in as a privy in estate with the mortgagor.[6] Thus, a

[1] Mich. Ins. Co. v. Brown, 11 Mich. 265.

[2] Haskell v. Bailey, 22 Conn. 569; Hughes v. Edwards, 9 Wheat. 490. Unless there are equitable circumstances which will take it out of the rule, courts of equity will square their decisions as near as may be by the rules of law. Crittendon v. Brainard, 2 Root, 485; Skinner v. Smith, 1 Day, 121; Lockwood v. Lockwood, *Id.* 295.

[3] Koch v. Briggs, 14 Cal. 256; King v. Meighen, 20 Minn. 264; Crawford v. Taylor, 42 Iowa, 260; Green v. Turner, 38 Iowa, 112; Parsons v. Noggle, 23 Minn. 328.

[4] See California Civil Code, 1872, §§ 346, 347; Kentucky Gen. Stat., 1873, ch. 71, art. 4, § 16; Mississippi Revised Code, 1871, ch. 45, § 2149; North Carolina Rev. Code, 1873, ch. 17, § 30; Hubbell v. Sibley, 50 N. Y. 468; Knowlton v. Walker, 13 Wis. 264.

[5] Davis v. Dresback, 81 Ill. 393; Stephens v. Illinois Mut. Fire Ins. Co., 43 Ill. 327; Pensoneau v. Pulliam, 47 Ill. 58.

[6] 2 Cruis. Dig. 91; Coote on Mortgages, 516; 4 Kent's Com. 162. Under Code Ala., 1886, § 1879, providing that real estate sold under power in a mortgage may be redeemed by the debtor within two years; sections 1883, 1885, extending the right to creditors in certain cases; section 1888, o a child who was a grantee of his parent; and section 1891 to heirs,

tenant in dower,[1] or jointress,[2] a tenant by curtesy,[3] a remainderman and reversioner,[4] a judgment creditor,[5] or subsequent incumbrancer[6] may redeem. In general, any one who has an interest in the land, derived directly or indirectly from or through the mortgagor may redeem.[7] Though it has been held that one holding a bond only for the conveyance of the equity of redemption, or any merely equitable title, is not entitled to maintain a bill for the redemption of a prior mortgage.[8] But, as observed by Mr.

devisees and personal representatives of the debtor—the right of redemption can only be exercised by the persons named in the statute and not by an assignee of the equity of redemption in the mortgaged premises. Powers v. Andrews (Ala.), 4 South Rep. 263; overruling Bailey v. Timberlake, 74 Ala. 221.

[1] Newhall v. Savings Bank, 101 Mass. 431; Taggart v. Wade, 1 N. Y. Supp. 900.

[2] Howard v. Harris, 1 Vern. 190.

[3] Gibson v. Crehore, 5 Pick. 146; Eaton v. Simonds, 14 Pick. 98.

[4] Smith v. Provin, 4 Allen, 516.

[5] Cahoon v. Laffan, 2 Cal. 595; Elliot v. Patton, 4 Yerg. 10.

[6] Burnet v. Denniston, 5 Johns. Ch. 35; Brown v. Worcester Bank, 8 Metc. 47; Allen v. Clark, 17 Pick. 47; Wiley v. Ewing, 47 Ala. 418. And see Beach v. Shaw, 57 Ill. 17; Hogden v. Guttery, 58 Ill. 431; Tuttle v. Dewey, 44 Iowa, 306.

[7] Boqut v. Coburn, 27 Barb. 230; Pearce v. Morris, L. R. 5 Ch. App. 229; Eisaman v. Gallagher (Neb.), 37 N. W. Rep. 941. If he is affected by the mortgage, and would be a loser by its foreclosure, he may redeem. On the other hand, if he has no interest in the estate he is not entitled to redeem. Smith v. Austin, 9 Mich. 465; Moore v. Beasom, 44 N. H. 215; Boarman v. Catlett, 13 Smed. & M. 149. The grantee of the mortgagor has a right to redeem, though not mentioned in the decree of foreclosure. Farrell v. Parlier, 50 Ill. 274. The right of the successive holders of a series of notes, maturing at different times and secured by the same mortgage, to redeem from a foreclosure and sale in favor of the holder of the note first maturing, is the same as that of separate junior incumbrancers to redeem from a foreclosure of a prior mortgage. Preston v. Hogden, 50 Ill. 56. And see Colwell v. Warner, 36 Conn. 224; Roberts v. Fleming, 53 Ill. 196. Where the equity of redemption is of considerable value and it appears that the defendant understood that one who purchased it from the vendee at the sale took the title to allow him to redeem and therefore gave up efforts to obtain money from other sources for that purpose, he is entitled to decree for redemption. Newman v. Locke (Mich.), 36 N. W. Rep. 166.

[8] In Massachusetts, the power of the court to entertain jurisdiction of bills in equity to redeem mortgaged estates is derived from Rev. Stats.,

Jones, he may be authorized to use the name of the holder of the legal title to pursue the remedy in his name.[1] In those States in which all actions are required under the code to be brought in the name of the real party in interest, no reason is perceived why he should not be permitted to maintain an action in his own name.

§ 479. **The Sum Payable to Effect Redemption.**—It is a well settled proposition, that he who redeems must pay the full amount of the mortgage. It matters not that the mortgaged premises have subsequently become divided and are held in separate parcels by different persons. The redemption must be of the entire mortgage, and not by parcels. Although the owner of any interest may redeem, in order to do so, he must pay the whole debt, and he will then become the equitable assignee of the mortgage as to the other interests.[2] The rule that nothing short of payment of the whole debt will work a redemption, applies, although

ch. 107, §§ 13, 18, *et seq.*, and is confined to bills brought by "the mortgagor, or any person lawfully claiming or holding under him." This does not include suits brought by those having only an equitable title to the right of redemption, or claiming it merely under contracts of purchase, but is intended to comprehend only those which are brought by the mortgagor, or by a person to whom his legal title has been transferred by deed, or by operation of law. McDougald v. Capron, 7 Gray, 278.

[1] Jones on Mortgages, § 1059.

[2] Mullanphy v. Simpson, 4 Mo. 319; Taylor v. Porter, 7 Mass. 355; Smith v. Kelly, 27 Me. 237; Johnson v. Candage, 31 Me. 28; Chittenden v. Barney, 5 Vt. 28; Downer v. Wilson, 33 Vt. 1; Fletcher v. Chase, 16 N. H. 42; State v. Clough, 23 Minn. 17. As to the right to contribution, see *infra*, § 481. As a redemption of the estate is an entirely voluntary act, one tenant in common cannot require his co-tenants to unite with him in redeeming the mortgage: but if he elects to redeem he must pay the whole amount due on the mortgage, and hold the same to his own use, unless those holding the other portion of the equity seek to come in and share with him, paying their proper contributory share, which they will have the right to do. Gibson v. Crehore, 5 Pick. 152; Merritt v. Hosmer, 11 Gray, 276. Having paid the whole mortgage debt, he has no right of contribution against his co-tenants personally, but his only remedy is by a foreclosure of their interests in the land if they fail to pay their share, and they have the option to pay or give up their interests. Lyon v. Robbins, 45 Conn. 513.

the debt itself may be barred by the statute of limitations,[1] or the land may have sold for less than the debt.[2] And if a mortgagor comes in to redeem, he must pay up, not only the mortgage money, but also subsequent advances made by the mortgagee.[3] Likewise, if the holder of the mortgage has paid prior incumbrances for the protection of the estate, these must also be paid by a party redeeming.[4] The governing principle of all these cases is that "he who seeks equity, must do equity." Besides, the holder of a mortgage, who has been compelled to discharge a prior incumbrance for the protection of the estate, is subrogated to the rights of the prior incumbrancer.[5]

§ 480. **Of the Mortgagee's Liability to Account.**—If the mortgagee takes possession of the mortgaged premises before foreclosure, he is accountable to the mortgagor for the rents and profits of the estate; and this liability continues until the right of redemption is barred.[6] As to the extent

[1] Balch v. Onion, 4 Cush. 559; Pratt v. Huggins, 29 Barb. 277; Booker v. Anderson, 35 Ill. 86.

[2] Bradley v. Snyder, 14 Ill. 263; Benedict v. Gilman, 4 Paige, 58; Robinson v. Ryan, 25 N. Y. 320; Gage v. Brewster, 31 N. Y. 218; Raynor v. Selmes, 52 N. Y. 579; Baker v. Pierson, 6 Mich. 523; Johnson v. Harmon, 19 Iowa, 56; Martin v. Fridley, 23 Minn. 13. "The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore, he can only lift it by paying it. The money will be subject to distribution between the mortgagee and purchaser in equitable portions, so as to reimburse the latter his purchase-money, and pay the former the balance of his debt." Collins v. Riggs, 14 Wall. 491.

[3] Ogle v. Ship, 1 A. K. Marsh. 287; Reed v. Lansdale, Hard. (Ky.) 6.

[4] *Ante*, § 478.

[5] Jenness v. Robinson, 10 N. H. 215.

[6] On a bill to redeem, the mortgagee is liable to account for the rents and profits received from the date of his entry into possession under the mortgage, and not merely from the date of the mortgagor's demand. Dela v. Stanwood, 62 Me. 574. A prior mortgagee, under a mortgage upon a term of years, who takes possession of the premises under a purchase of the fee from the mortgagor, who had acquired the fee after he made the mortgage, is not to be regarded as a mortgagee in possession, and as such accountable for the rents and profits to a junior mortgagee of the same term. Rogers v. Herron, 92 Ill. 583. When the mortgagee has not refused to account and there is no dispute as to the

of the mortgagee's liability, and what items of expense, incurred in respect to the mortgaged estate, he will be entitled to charge to the mortgagor, the authorities are by no means uniform. The general rule is that the mortgagee is accountable for the actual receipts of the net rents and profits, and nothing more, unless by his wilful default or gross negligence the receipts have been diminished.[1] By taking possession, he imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would with reasonable diligence have received.[2] On the other hand, he is entitled to be allowed for all necessary expenses incurred in the exercise of reasonable care and prudence in the management of the estate; such, for instance, as the payment of taxes;[3] insurance, when paid for the mortgagor;[4] or a prior incumbrance;[5] and for all reasonable and necessary repairs.[6]

A mortgagee in possession is bound to make all reasonable and necessary repairs upon the mortgaged premises, and will be responsible for the damage occasioned by any

amount due on the mortgage a bill in equity to redeem cannot be maintained. Eastman v. Thayer, 60 N. H. 408.

[1] Bainbridge v. Owen, 2 J. J. Marsh. 465; Van Buren v. Olmstead, 5 Paige, 9; Bell v. Mayer, etc., 10 Paige, 49; Strong v Blanchard, 4 Allen, 538; Anthony v. Rogers, 20 Mo. 281; Bailey v. Myrick, 52 Me. 135; Milliken v. Bailey, 61 Me. 317; Harper v. Ely, 70 Ill. 581; Montague v. Boston & Albany R. R., 124 Mass. 242; Blum v. Mitchell, 59 Ala. 535; Turner v. Johnson (Mo.), 7 S. W. Rep. 570; Pinneo v. Goodspeed (Ill.), 12 N. E. Rep. 196. A mortgagor is entitled to all rents and profits accruing after tender of redemption. Parmer v. Parmer, 74 Ala. 285.

[2] Shaeffer v. Chambers, 6 N. J. Eq. 548; Benham v. Rowe, 2 Cal. 387.

[3] Taxes, when paid by the mortgagor, usually become a lien under the mortgage. Kortright v. Cady, 23 Barb. 490; Robinson v. Ryan, 25 N. Y. 320; Strong v. Blanchard, 4 Allen, 538; Harper v. Ely, 70 Ill. 581; Roberts v. Fleming, 53 Ill. 196; Blum v. Mitchell, 59 Ala. 535.

[4] *Ante*, § 452; Fowley v. Palver, 5 Gray, 549.

[5] Harper v. Ely, 70 Ill. 581.

[6] Strong v. Blanchard, 4 Allen, 538; Neesom v. Clarkson, 4 Hare, 97; Adkins v. Lewis, 5 Oreg. 292; Harper's Appeal, 61 Pa. St. 315; Roberts v. Fleming, 53 Ill. 196.

wilful default or gross neglect in this respect; but the natural effects of waste and decay from time, he will not be bound to repair,[1] What are reasonable and necessary repairs depends upon the particular circumstances of each case. And although the mortgagee is not bound to make improvements beyond what were strictly necessary, it is a question of frequent occurrence whether he shall not be entitled to compensation for such improvements. With few exceptions, it may be said to be a general rule that he is not entitled to charge for beneficial and permanent improvements put upon the mortgaged premises beyond what were required to keep them in necessary repair.[2] Though where he has done so in good faith, supposing that he was the absolute owner of the estate, he will generally be entitled to compensation for such improvements.[3] The mortgagee is not to be charged with increased rents and profits arising from the use of any permanent improvements made by him.[4]

It may be added that the mortgagee is not, in general, entitled to any compensation for his trouble in managing the estate, although there is an agreement between the parties to that effect.[5] Though in a few of the States a reasonable compensation has been allowed.[6] In Massachusetts a mortgagee in possession will be allowed, as compensation for managing the property, five per cent. on the rents collected.[7]

[1] Dexter v. Arnold, 2 Sumn. 108.

[2] Harper's Appeal, 64 Pa. St. 316; Moore v. Cable, 1 Johns. Ch. 385; McCarron v. Cassidy, 18 Ark. 34; Hidden v. Jordan, 28 Cal. 301.

[3] Troost v. Davis, 31 Ind. 34; Roberts v. Fleming, 53 Ill. 198; Miner v. Beekman, 50 N. Y. 337; Bacon v. Cattrell, 13 Minn. 194.

[4] Bell v. Mayor, etc., 10 Paige, 49.

[5] Breckenridge v. Brooks, 2 A. K. Marsh. 339; French v. Baron, 2 Atk. 120; Godfrey v. Watson, 3 Atk. 517; Moore v. Cable, 1 Johns. Ch. 388; Eaton v. Simonds, 14 Pick. 98. But reasonable pay to an agent for taking care of the mortgaged property may be allowed. Turner v. Johnson (Mo.), 7 S. W. Rep. 570.

[6] Gibson v. Crehore, 5 Pick. 146; Tucker v. Buffum, 16 Pick. 46; Waterman v. Curtis, 26 Conn. 241.

[7] Gerrish v. Black, 104 Mass. 400; Montague v. Boston & Albany R. Co., 124 Mass. 242.

§ 481. **Contribution to Redeem.**—It is a well established rule in equity, that where the estates of two or more persons are subject to a common incumbrance, and one pays the whole for the benefit of both, he shall have the right to hold the whole of the estate thus redeemed, until the other party shall pay an equitable portion of the sum paid for the common benefit; and in certain cases the party who paid the incumbrance may in equity enforce contribution from the other.[1] The right to enforce contribution exists only when the equities of the parties are equal. For instance, if there was an obligation resting upon the person who paid the incumbrance to pay the whole debt, he would not be entitled to contribution, although the other party may have been benefited by the payment. On the other hand, if the obligation to pay the debt rested upon one party and the other party paid it, the latter would not be entitled to contribution, but would be subrogated to the rights of the mortgagee; while, if the parties were under equal obligations to pay their own proportion of the debt, the party paying the whole debt would be entitled to contribution from the other in proportion to the value of his estate.[2] It follows that a mortgagor, who has sold a portion of the land covered by the mortgage by a warranty deed, cannot claim contribution of the purchaser, because he himself is liable for the whole debt. And the heir of the mortgagor is under the same obligation.[3] Where the mortgagor conveys the whole of the equity of redemption in separate parcels to different persons by simultaneous deeds, the grantees stand upon an equal footing, and one who pays the incumbrance is entitled to contribution from the others.[4] But whether several persons, who have suc-

[1] Gibson v. Crehore, 5 Pick. 146; Story Eq. Jur., § 477; Stevens v. Cooper, 1 Johns. Ch. 425; Cheesebrough v. Millard, *Id.* 409; Chase v. Woodbury, 6 Cush. 143; Salem v. Edgerly, 33 N. H. 46.

[2] Stevens v. Cooper, 1 Johns. Ch. 425; Gibson v. Crehore, 5 Pick. 152; Allen v. Clark, 17 Pick. 47; Salem v. Edgerly, 33 N. H. 50; Aiken v. Gale, 37 N. H. 501.

[3] Jones on Mortgages, § 1090.

[4] Stevens v. Cooper, 1 Johns. Ch. 425; Johnson v. White, 11 Barb. 194;

cessively purchased portions of the mortgaged estate, shall be liable to contribution, is a question upon which the authorities are not agreed.[1]

Questions of very great difficulty frequently arise in marshaling the burden according to the equities of different claimants, in order to preserve a just proportion among those who are bound in good conscience to a just contribution. The amount that each part owner shall be obliged to contribute to redeem his share of the estate must depend, of course, upon the peculiar circumstances and substantial equity of each case.

ARTICLE II.

PAYMENT.

SECTION.

483. The effect of payment or tender before and after default.
484. As to the sufficiency of a tender.
485. What constitutes payment.
486. Presumption of payment.
487. Subrogation.

§ 483. **The Effect of Payment or Tender before and after Default.**[2]—It is a familiar principle of the common law that the performance of the condition of a mortgage, according to its legal effect, defeats the estate of the mortgagee and revests the title in the mortgagor, without any written release of the mortgage or re-conveyance of the mortgaged premises. When payment is made on or before the law day, no release is needed except as evidence of the

Taylor v. Bassett, 3 N. H. 294; Aiken v. Gale, 37 N. H. 501; Bates v. Ruddick, 2 Iowa, 423; Bailey v. Myrick, 50 Me. 171.

[1] For a collection of the cases *pro* and *con* see 2 Washb. on Real Prop., 4th ed., 209, 220.

[2] See 15 Cent. L. J. 408.

fact, and to remove the apparent incumbrance from the record. If the mortgagee is in possession, the mortgagor may resume the same, either by entry or ejectment, without any such release, and will be in possession of the same estate as if no mortgage had been executed.[1]

Or if a lawful tender be made at the law day and refused, it has the effect to discharge the mortgage; though if there is a personal obligation, the debt may still be recovered by an action at law.[2] But at common law a tender made after a breach of condition does not operate to discharge the mortgage.[3] And even payment and acceptance of the mortgage money, after the law day has expired, does not alone revest the title in the mortgagor. The estate having been forfeited at law, a conveyance is necessary to revest it.[4] Therefore, where payment is made after

[1] Merrill v. Chase, 3 Allen, 339; Furbush v. Goodwin, 25 N. H. 425; Griffin v. Lovell, 42 Miss. 402; Erskine v. Townsend, 2 Mass. 493. "The act of payment in the country, *ante vel apud diem*, saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title." *Per* Bigelow, C. J., in Grover v. Flye, 5 Allen, 543. A wife's right to dower, relinquished by her, in a mortgage of property, attaches as soon as the mortgage is paid. Atkinson v. Stewart, 46 Mo. 510; Atkinson v. Angert, *Id.* 515.

[2] Martindale v. Smith, 1 Q. B. 389; Columbian Building Association v. Crump, 42 Md. 192; Hershey v. Dennis, 53 Cal. 77. A tender of the amount due upon a mortgage, if made in such a manner that the holder of the mortgage understands it at the time, as a present, absolute and unconditional tender thereof, operates *ipso facto*, to discharge the lien of the mortgage, though the tender be not thereafter kept good. Potts v. Plaisted, 30 Mich. 149. If the party refusing, subsequently agrees to accept, and demands payment of the money previously tendered, and the party who made the tender is not then ready to pay it, interest must run on as if no tender had been made until the money is paid or brought into court. Columbian Building Association v. Crump, 42 Md. 192.

[3] Currier v. Gale, 9 Allen, 522; Perre v. Castro, 14 Cal. 519; Cross v. Robinson, 21 Conn. 379; Smith v. Kelly, 27 Me. 237; Shield v. Lozear, 34 N. J. L. 496. But serves to lay the foundation for a bill to redeem. Rowell v. Michell, 68 Me. 21.

[4] Phelps v. Sage, 2 Day, 151; Doton v. Russell, 17 Conn. 146; Stewart v. Crosby, 50 Me. 130. The same is held upon a construction of the

condition broken, and there has been no release of the mortgage, the mortgagee being in possession, the mortgagor cannot maintain a writ of entry,[1] or ejectment,[2] against him; but, if necessary, must resort to equity for a release of the conveyance.

In equity, a mortgage, being regarded as a mere security for a debt, can have no existence after the debt has been discharged.[3] Consequently in those States in which the equitable doctrine of mortgages has been adopted, payment or tender of payment, after the condition of the mortgage is broken, at any time before the mortgage is foreclosed or the right of redemption has become barred, is equivalent to payment or tender at the day mentioned in the condition, and the lands are thereby discharged of the incumbrance.[4] Upon payment of the mortgage debt, or anything which amounts to payment, the title to the mortgaged premises is in the mortgagor, without any release or conveyance.[5] But the rule that a mortgage is satisfied by an extinguishment of the debt secured by it, does not apply where the debt is merely barred by the statute of limitation, or by a certificate in bankruptcy.[6] The above statement is subject to the qualification also that, in some of the States, where payment

statute in Mississippi. Wolfe v. Dowell, 13 Smed. & M. 103; Smith v. Otley, 26 Miss. 291.

[1] Dyer v. Toothaker, 51 Me. 380.

[2] Smith v. Vincent, 15 Conn. 1.

[3] *Ante*, § 407.

[4] Johnson v. Sherman, 15 Cal. 287; Swett v. Horn, 1 N. H. 332; Caruthers v. Humphrey, 12 Mich. 270; Jackson v. Crafts, 18 Johns. 110; Arnot v. Post, 6 Hill, 65; Kortright v. Cady, 21 N. Y. 343; Farmers, etc. Co. v. Edwards, 26 Wend. 541; Hartley v. Tatham, 26 How. Pr. 158.

[5] Rogers v. De Forest, 7 Paige, 272; Jackson v. Davis, 18 Johns. 7; Hatfield v. Reynolds, 37 Barb. 612; Griffin v. Lovell, 42 Miss. 402. Where a note secured by a mortgage was indorsed by the mortgagee, who was afterwards compelled to pay it, it was held that this was not such a payment as discharged the mortgage. Rogers v. Traders' Ins. Co., 6 Paige, 583. But payment of the mortgage debt from the funds of the debtor extinguishes the mortgage. Kinley v. Hill, 4 Watts & S. 426; Perkins v. Dibble, 10 Ohio, 433; Shepherd v. McClain, 18 N. J. Eq. 128.

[6] Bush v. Cooper, 26 Miss. 599; Chamberlain v. Meeder, 16 N. H. 381.

operates as a discharge of the mortgage, a tender after the law day has only the effect to stop the accruing of interest and to protect the debtor from costs.[1] While in other States, tender of the amount due on a mortgage after the law day is a discharge of the lien just as much as payment is; though the land is only discharged from the mortgage, the debt remains.[2]

§ 481. **As to the Sufficiency of a Tender.**—It is a general rule that a tender, to be effectual, must be made by the debtor, or some one authorized by him to make it.[3] A mortgagor, although he has sold and transferred the mortgaged estate, remains a debtor and may make a good tender. And a purchaser of the mortgaged premises, who has assumed to pay the mortgage and thereby made the debt his own, may also discharge the lien by a tender of the amount due. But it has been held that one who merely buys subject to the mortgage has only a right to redeem, which he must do by actual payment, or by bringing the money into court for the purpose of payment.[4] The tender must also be made to a person authorized, and who has capacity to receive it. It must in general be made to the person having the legal estate and who has power to discharge the mortgage. A tender, made to the mortgagee after he had assigned the mortgage, and the debtor had notice of the assignment, would not be effectual. It must be made to the assignee.[5] Where there is no place appointed at which payment is to be made, the debtor is, in general, bound to seek the creditor

[1] Shields v. Lozear, 34 N. J. L. 496.

[2] Jackson v. Crafts, 18 Johns. 110. See Willard v. Harvey, 5 N. H. 252; Darling v. Chapman, 14 Mass. 101; Arnot v. Post, 6 Hill, 65.

[3] Co. Litt. 206.

[4] Harris v. Jex, 66 Barb. 232.

[5] Dorkray v. Noble, 8 Me. 278. Where two deeds of trust were given to secure several note, all of which were held by different persons, and it was provided in each deed that if the grantor should pay one-half of the debt and interest expressed in the notes the deed should become void, and the grantor in one of the deeds tendered to the holder one-half of his note and interest, and the holder refused the tender, it was held that as to that note the lien of the deed of trust was discharged. Thornton v. Nat. Ex. Bank, 71 Mo. 221.

and make a personal tender.[1] But the mortgagor is not bound to follow his creditor beyond the limits of the State to make a tender.[2] A personal tender may also be excused, when the mortgagee has shown by his conduct or declarations that he intends to avoid a tender.[3] Where a place of payment has been appointed, the presence of the debtor with money is enough, if the creditor be absent from the appointed place at the appointed time of payment.[4] The tender, if required, must be made in lawful coin, or paper money which has been legalized for that purpose, or foreign coin made current by law.[5] But tender in bank notes, current at the place of payment, will be good if no objection is made at the time to the quality of the tender. This objection cannot afterwards be raised.[6] The tender, moreover, must be absolute and unconditional,[7] and must be of the exact amount due;[8] though more may be tendered, if the excess is not to be handed back; and asking change does not vitiate the

[1] Harris v. Mulock, 9 How. Pr. 402.

[2] Houbie v. Volkening, 49 How. Pr. 169.

[3] A mortgagee loses his lien by evading tender of payment. Ferguson v. Popp, 42 Mich. 115.

[4] Southworth v. Smith, 7 Cush. 391.

[5] Thorndike v. United States, 2 Mason, 1; Stark v. Coffin, 105 Mass. 328. A mortgage "to be paid in gold or silver coin, lawful money of the United States," may be paid with United States legal tender notes, as such lawful money. Rodes v. Bronson, 34 N. Y. 649; Kimpton v. Bronson, 45 Barb. 618.

[6] Biddulph v. St. John, 2 Sch. and Lef. 521. A payment to a master, for the redemption of premises sold under a decree, made in bills of a specie paying bank, current at the place of payment, is a good payment. Augur v. Winslow, 1 Clark (N. Y.) 258.

[7] Ferguson v. Wagner, 41 Ind. 450; Sager v. Tupper, 35 Mich. 134; Tuthill v. Morris, 81 N. Y. 94. A condition that the holder of the mortgage should execute a quitclaim deed to the mortgaged premises would prevent a refusal of tender from operating as a discharge of the lien. Loring v. Cooke, 3 Pick. 48; Dodge v. Brewer, 31 Mich. 228.

[8] The rule that the lien of a mortgage cannot be discharged in whole or in part by a tender of less than the whole amount due thereon, is not affected by the fact that only a portion of the amount due belonged to the holder, and the balance to some other person for whom he holds the mortgage in trust. Graham v. Linden, 50 N. Y. 547.

tender, unless objection is made on that account.[1] In general, all the conditions of the obligation must be fulfilled, and the money must be actually produced and offered, unless the circumstances of refusal amount to a waiver. It has also been held that a holder of a mortgage, to whom a tender is proposed to be made, is entitled to a reasonable opportunity to look over the mortgage and accompanying papers to calculate and ascertain the amount due.[2]

§ 485. **What Constitutes Payment.**—In respect to what constitutes such payment as will be sufficient to discharge the lien of a mortgage, it may be said that nothing short of payment in full of the whole amount due on the mortgage will have that effect. But various circumstances have been held to amount to such payment, other than an actual handing over of the money. Such questions necessarily depend upon the peculiar circumstances of each case rather than upon any fixed set of rules and principles. A few instances only will be given, by way of illustration. Thus, where an attorney, who was foreclosing his client's mortgage, took part in cash from the debtor, and the debtor's note to himself personally for the balance, by way of a loan to the debtor, and discontinued the suit, declaring the mortgage paid, it was held that the mortgage was intended to be, and was extinguished.[3] So, the voluntary giving up and satisfying of a mortgage, and taking the note of a third party in lieu thereof, is a relinquishment of the mortgage lien, and a surrender of the mortgage.[4] But the mortgage is not defeated or impaired by any change in the form of the indebtedness; as by a renewal of the original mortgage note,[5]

[1] Robinson v. Cook, 6 Taunt. 336; Cadman v. Lubbock, 5 Dowl. & Ry. 289.

[2] Potts v. Plaisted, 30 Mich. 149; Tuthill v. Morris, 81 N. Y. 94.

[3] Hawkes v. Dodge County, etc. Ins. Co., 11 Wis. 188. And see Carter v. Burr, 113 U. S. 737; Kennelly v. Kelly, 51 Conn. 329.

[4] Mattix v. Weand, 19 Ind. 151. And see Jarnagan v. Gaines, 84 Ill. 203.

[5] *Ante*, § 471; Lippold v. Held, 58 Mo. 213; Moore v. Bond, 75 N. C. 72; McGuire v. Van Pelt, 55 Ala. 344.

or by a partial payment, and giving a new note for the residue of the debt due and unpaid. The mortgage lien remains as long as the debt is unsatisfied.[1] Where the assignee of a mortgage took from the mortgagor certain notes secured by another mortgage, to an amount equal to the sum paid by him for such assignment, the court held that it was a question of fact whether such notes were taken in payment of such sum, or only as collateral security for the original debt. If the former, the original mortgage would be discharged; if the latter, it would remain in force.[2] But where the assignee of a mortgage delivered it up to the mortgagor, upon receiving from him certain personal property, but before this property could be sold several executions were levied upon it, which were liens upon it, and shortly after the mortgagor paid off the executions, but did not redeliver the property taken in execution to the assignee of the mortgage, it was held that there had been no payment of the mortgage.[3] But where the mortgage debt has been once canceled by payment, it cannot, by a subsequent agreement or arrangement between the parties, be revived, so as to be valid against a judgment creditor whose lien attached after the discharge.[4] But

[1] Chase v. Abbott, 20 Iowa, 154; Swan v. Yaple, 35 Iowa, 248; Foster v. Paine, 63 Iowa, 85. And where a bond secured by a mortgage was paid at maturity by a check for a part, and a note for the residue, payable in one year, the check and note being indorsed on the bond and the bond given up, which note was not paid at maturity, it was held that these acts did not work an extinguishment of the mortgagee's lien, there being no proof of an agreement to that effect. Maryland, etc. Co. v. Wingert, 8 Gill, 170.

[2] Collamer v. Langdon, 29 Vt. 32. And see Kieser v. Baldwin, 62 Ala. 526.

[3] Sherwood v. Elslow, 5 Ind. 218. And see Deming v. Comings, 11 N. H. 474.

[4] Large v. Van Doren, 14 N. J. Eq. 208; Warner v. Blakeman, 36 Barb. 501; Kellogg v. Ames, 41 Barb. 218; Bowman v. Manter, 33 N. H. 530; Gardner v. James, 7 R. I. 396; Boyd v. Parker, 43 Md. 182. A mortgagor, after the mortgage debt became due, delivered to the mortgagee $1,000, which, after being retained for a few days, was returned to the mortgagor at his request, and was not indorsed upon the mortgage. It was held that, in the absence of an express agreement to the

before a payment can have the effect to discharge the mortgage, it must be actually appropriated to that purpose.[1] The debtor, when he pays money to his creditor, may apply it to whatever account he pleases;[2] but if at the time of making such payment, he fails to make any specific application of the money paid, the creditor may apply it to any account due him from the debtor, although it be one for which he holds no security.[3]

The receipt of a mortgagee, acknowledging satisfaction of the debt secured by the mortgage, is not conclusive evidence of its discharge, but it is open to explanation.[4]

Foreclosure of a mortgage is not an extinguishment of the debt, except as to the amount realized upon it. The mortgagor may sue for and recover the deficiency, if any. But if the debt has been fully paid by a sale of the premises, or if the mortgagee has entered and taken possession, and the estate is of equal, or greater value than the debt, the debt is of course satisfied.[5] The foreclosure must, however, have been perfected. A decree of foreclosure, before the title of the mortgagee has become absolute by expiration of time limited for redemption, is not a satisfaction of the mortgage debt, either in whole or in part.[6] But after foreclosure the estate may be valued, and the mortgagee may then be deemed to have received payment

contrary, the $1,000 must be deemed to have been paid upon the mortgage, and that the re-delivery of it did not, as against other creditors of the mortgagor, revive the lien of the mortgage. Martin v. Vedder, 5 Cow. 671.

[1] Payment to a mortgagee does not extinguish the mortgage debt, if such is not the intention of the parties to the payment. New Haven Sav. Bank v. McPartlan, 40 Conn. 90.

[2] Whether interest, principal or another debt. Petty v. Dill, 53 Ala. 641; Knox v. Johnston, 26 Wis. 41.

[3] Prouty v. Price, 50 Barb. 344; Niagara Bank v. Rosevelt, 9 Cow. 409.

[4] Porter v. Hill, 9 Mass. 31; Perkins v. Pitts, 11 Mass. 125; Parsons v. Welles, 17 Mass. 419; Pearce v. Savage, 45 Me. 90. But see Porter v. Perkins, 5 Mass. 233.

[5] Hurd v. Coleman, 42 Me. 182; Green v. Cross, 45 N. H. 574.

[6] Peck's Appeal, 31 Conn. 215. See Nunemacher v. Ingle, 20 Ind. 135; Stackpole v. Robbins, 47 Barb. 212.

pro tanto.[1] Where the foreclosure is by sale of the mortgaged premises, and this has been fairly conducted, the price for which the premises sold fixes the amount, of course, to be applied on the debt.

§ 486. **Presumption of Payment.**—There are certain circumstances which, when proved, constitute presumptive evidence of payment, and which, in the absence of more direct testimony, will be held sufficient. Thus, for instance, the possession by the mortgagor of the notes secured by the mortgage, is *prima facie* evidence that they have been paid; but it is only *prima facie* evidence of payment.[2] It raises a presumption, in absence of all other proof, that the notes have been paid.[3] A presumption of payment will also arise from lapse of time. Where the mortgagee has never entered under the mortgage, and there has been no payment of interest, nor demand thereof, nor any admission of the mortgage as a subsisting lien, within twenty years, the mortgage will be presumed to have been satisfied.[4] But where the possession of the land has been constantly in the mortgagee,[5] or where the debt has been

[1] West v. Chamberlin, 8 Pick. 336; Amory v. Fairbanks, 3 Mass. 562.

[2] Richardson v. Cambridge, 2 Allen, 118; Grimes v. Kimball, 3 Allen, 518; Chapman v. Hunt, 18 N. J. Eq. 414; Johnson v. Nations, 26 Miss. 147; Succession of Norton, 18 La. Ann. 36; Allen v. Sawyer, 88 Ill. 414.

[3] Ormsby v. Barr, 21 Mich. 474. One who purchases land covered by an undischarged mortgage, cannot claim to be a purchaser in good faith, and without notice of the mortgagee's equities, simply because the mortgagor has possession of the notes, and exhibits them to him, if he has knowledge of facts sufficient to put a prudent man on inquiry; and especially if the mortgagee is easily accessible, and an inquiry of him would have elicited the fact that the mortgage was still in force. Boxheimer v. Gunn, 24 Mich. 372.

[4] Dunham v. Minard, 4 Paige, 441; Collins v. Torry, 7 Johns. 278; Jackson v. Hudson, 3 Johns. 375; Giles v. Baremore, 5 Johns. Ch. 545; Wanmaker v. VanBuskirk, 1 N. J. Eq. 686; Evans v. Huffman, 5 N. J. Eq. 354; Cheever v. Perley, 11 Allen, 584; Boyd v. Harris, 2 Md. Ch. 210; Goodwyn v. Baldwin, 59 Ala. 127; Blethen v. Dwinal, 35 Me. 556; Chick v. Rollins, 44 Me. 104; Kellogg v. Dickinson (Mass.), 18 N. E. Rep. 223. See *infra*, § 497. But no presumption will arise if, during the twenty years, partial payments are made on the debt. Cook v. Parham, 63 Ala. 456.

[5] Crooker v. Jewell, 31 Me. 306; Brobst v. Brock, 10 Wall. 519.

recognized by the payment of interest or part of the principal,[1] or by an admission that the debt is due,[2] lapse of time affords no presumption that the debt has been paid. A shorter period than twenty years may be sufficient to raise that presumption when other circumstances come in to strengthen it,[3] or where the statutory period of limitation is less than that.[4]

§ 487. **Subrogation.**—When the mortgage debt has been paid by another than the debtor entitled to redeem, the question sometimes arises whether such payment shall operate as a discharge of the mortgage, or an assignment of it, whereby the party paying becomes subrogated to the rights under the mortgage. The rule in respect to such transactions is thus stated in an early case in Massachusetts: "Whether a given transaction shall be held in legal effect to operate as a payment and discharge which extinguishes the mortgage, or an assignment which preserves and keeps it on foot, does not so much depend upon the form of words used as upon the relation subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien—a duty in performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such assignment shall be held to constitute an extinguishment or an assignment, according to

[1] Howard v. Hildreth, 18 N. H. 105; Cook v. Parham, 6 Ala. 656.

[2] Frear v. Drinker, 8 Pa. St. 520; Rockhill v. Rockhill (N. J.), 14 Atl. Rep. 760.

[3] Jackson v. Pratt, 10 Johns. 381; Buckmaster v. Kelley, 15 Fla. 180. Where a suit was brought to foreclose a mortgage, and dismissed for want of prosecution, and the dismissal acquiesced in for a long time, it was presumed that the mortgage had been satisfied. Nelson v. Lee, 10 B. Mon. (Ky.) 495.

[4] Roberts v. Welsh, 8 Ired. (N. C.) Eq. 287; Brown v. Becknall, 5 Jones (N. C.), Eq. 423.

the intent of the parties, and their respective interests in the subject will have a strong bearing upon the question of such intent."[1]

ARTICLE III.

DISCHARGE.

SECTION.

490. Who may make or enter a discharge.
491. Modes of effecting a discharge.
492. The effect of a partial release of a mortgage.
493. A discharge obtained by fraud or made through mistake.

§ 490. **Who may Make or Enter a Discharge.**—A discharge must, in general, be granted by the legal holder of the mortgage. But after an equitable assignment of the mortgage by a transfer of the debt, and notice to the mortgagor, payment to the assignor and a discharge by him will

[1] Shaw, C. J., in Brown v. Lapham, 3 Cush. 554; Wadsworth v. Williams, 100 Mass. 131; Carlton v. Jackson, 121 Mass. 592; Frivel v. Zuber, 67 Tex. 275; Everston v. Kan. Central Bank, 33 Kan. 352; Fears v. Albra, 69 Tex. 437; Detroit F. & M. Ins. Co. v. Aspinwall, 48 Mich. 238; Gans v. Thieme, 93 N. Y. 225; Acer v. Hotchkiss, 97 N. Y. 395. Where money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of the assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice and the just intention of the parties. Carter v. Taylor, 3 Head (Tenn.), 30; Willard v. Harvey, 5 N. H. 252; Bailey v. Willard, 8 N. H. 429; Heath v. West, 26 N. H. 191; Drew v. Rust, 36 N. H. 334; Howe v. Woodruff, 12 Ind. 214. Where a mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any contract or agreement by deed or other writing to pay it, the grantor becomes, as between the parties, the surety of the grantee, and if he pays the mortgage debt, he has the right to be subrogated to all the rights of the mortgagee. Wood v. Smith, 51 Iowa, 156. One who pays a mortgage, has it discharged and takes a new one will not be subrogated to the rights of the mortgagee. Morris v. White 36 N. J. Eq. 324.

not discharge the mortgage.[1] If the debtor has notice of the transfer of the debt, he must pay to the assignee of the debt, regardless of the ownership of the mortgage as it appears of record, and rely on the statutory provisions for enforcing a discharge of record.[2] Such notice may be constructive as well as actual, and consequently, in making payment of a mortgage, care should be taken to require the production of the notes, and to follow up any inquiry that may be suggested in regard to the rights of third parties in respect to the debt.[3] Where a mortgage has been assigned by a formal assignment, the assignee is, of course, the proper person to receive payment and to discharge the mortgage. But if he fails to give notice of the assignment to the debtor, a payment made in good faith to the assignor and a discharge entered by him may be held good.[4] When a discharge of a recorded mortgage is executed by a person other than the mortgagee, a subsequent purchaser or incumbrancer is bound to inquire by what authority such person assumed to discharge it, and is chargeable with notice of all the facts which the reasonable prosecution of such inquiry would elicit.[5] A mortgage, held by two or more persons jointly to secure a joint debt, may be paid to either of them, and a release, executed by the party to whom payment is made, will be effectual as to all.[6] So, upon the death of one of two joint mortgagees, the survivor has the exclusive right to receive payment and to dis-

[1] Cutler v. Haven, 8 Pick. 490; Gordon v. Mulhare, 13 Wis. 22.

[2] Jones on Mortgages, § 956.

[3] See *ante*, § 470; Cutler v. Haven, 8 Pick. 490.

[4] *Ante*, § 472.

[5] Swarthout v. Curtis, 5 N. Y. 301.

[6] Harvey v. Hurlburt, 3 Vt. 561; Weir v. Mosher, 19 Wis. 311. One of two executors may release a mortgage belonging to the estate, without the signature or assent of his co-executor. See Pierson v. Hooker, 3 Johns. 68; Bulkley v. Dayton, 14 Johns. 387; Carman v. Pultz, 21 N. Y. 550; People v. Keyser, 28 N. Y. 235; Bowes v. Seeger, 8 Watts. & S. 222. The right to the money secured by a mortgage being personal, either one of several mortgagees can receive the same and discharge the right to recover it of the mortgagor. People v. Keyser, 28 N. Y. 235. But see Thornton v. Irwin, 43 Mo. 153.

charge the mortgage.[1] But a mortgage given to two persons to secure their several demands, is several and not joint; each has a right to force his claim under the mortgage in a form adapted to his case, and each must join in the execution of a release; and, of course, the surviving mortgagee is not entitled to receive payment, nor to discharge the mortgage as to the debt due the deceased mortgagee.[2]

§ 491. **Modes of Effecting a Discharge.**—In general, nothing but payment in fact, or a release of the mortgage, will discharge the lien.[3] Though if such transactions occur as would render it inequitable that the mortgage should be kept on foot, the mortgagee would be estopped from setting it up. For example, if the mortgagee stands by at a sale of the mortgaged premises, made by the mortgagor, acquiesces in it and receives the consideration of the purchase, the estate sold is thereby freed from the mortgage.[4]

We have already seen that performance of the condition of a mortgage, on or before the law day, is everywhere held to defeat the estate of the mortgagee and revest the title in the mortgagor, and payment actually received after condition broken is an equitable release of the mortgage. And in those States in which a mortgage is regarded as merely a lien upon land, such payment is in fact a discharge of the mortgage. In such States, any act, which discharges the debt secured by the mortgage, discharges the mortgage.[5] And part payment of the mortgage debt is a satisfaction and release of the mortgage *pro tanto*.[6] But where

[1] Appleton v. Boyd, 7 Mass. 131; Goodwin v. Richardson, 11 Mass. 469; People v. Keyser, 28 N. Y. 235.

[2] Burnett v. Pratt, 22 Pick. 556.

[3] Crosby v. Chase, 17 Me. 369; Folsom v. Lockwood, 6 Minn. 186; Ladd v. Wiggin, 35 N. H. 421; Parkhurst v. Cummings, 56 Me. 155.

[4] McCormick v. Digby, 8 Blackf. 99; Taylor v. Cole, 4 Munf. 351. See West v. Reed, 55 Ill. 242; Proctor v. Thrall, 22 Vt. 262.

[5] Sherman v. Sherman, 3 Ind. 337; Terrio v. Guidry, 5 La. Ann. 598; LeBeau v. Glaze, 8 La. Ann. 474. The release of the debt discharges the mortgage. Jackson v. Stockhouse, 1 Cow. 122; Blodgett v. Wadhams, Hill & D. Supp. (N. Y.) 65.

[6] New York Life Ins. Co. v. Howard, 2 Sandf. Ch. 183; Champney v.

a mortgage retains its common-law character of a conveyance of the legal title, a discharge can only be effected by a release or re-conveyance of the mortgaged premises. The debt being paid after default, without a release, of the mortgaged estate, the mortgagee holds the legal title in trust for the mortgagor, and subject to his direction. If the mortgagee, having received full payment of his debt, refuses to release the estate, he may be compelled to do so by a proceeding in equity.[1] And a penalty is generally prescribed by statute for such refusal, in addition to the relief granted by a court of equity.[2] In most States when the mortgage is satisfied, before or after breach at any time before foreclosure, the mortgagee is bound upon request of the mortgagor and at his expense to execute and acknowledge a sufficient re-conveyance or enter satisfaction in the proper office.[3]

It is important in every case, even where payment of the mortgage debt operates as a discharge, that the mortgage shall be discharged of record. And this is true not only on account of removing the apparent incumbrance from the record, and to prevent any interest being acquired under it without notice of the payment; but a purchaser of the mortgaged premises who buys, before satisfaction of the mortgage is duly entered of record, takes the estate subject to all the equities of the mortgagee or holder of the notes. The record of the mortgage is notice of the rights of parties claiming under it; and even possession of the

Coope, 32 N. Y. 543; Briggs v. Seymour, 17 Wis. 255; Howard v. Gresham, 27 Ga. 347; Grayson v. Mayo, 2 La. Ann. 927.

[1] McNair v. Picotte, 33 Mo. 57. And a mortgagee or trustee who fails or refuses, when duly requested, to enter up such satisfaction, or to execute a deed of release, is liable in damages to the party aggrieved. Verges v. Gibboney, 17 Mo. 171; Sherwood v. Wilson, 2 Sweeney, 684; Renfro v. Adams, 62 Ala. 302. A judgment debtor, demanding a satisfaction, is bound to offer the instrument to be executed to the creditor, and to offer to pay the expense of its execution. Pettengill v. Mather, 16 Abb. Pr. 399.

[2] Crumbly v. Barden (Wis.), 36 N. W. Rep. 19.

[3] Stimson's Amer. Stat., § 1901.

notes by the mortgagor,[1] or a receipt of the mortgagee,[2] will not be conclusive of payment, but is open to explanation.

For the reasons above stated provision is made in nearly all of the States for the discharge of a mortgage by matter of record. The usual statutory provision is, that a mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction of the mortgage in the presence of the clerk or recorder, who must subscribe as a witness.[3] But this method of entering a discharge is not exclusive, although no other is provided for by statute. A discharge may nevertheless be effected by a deed of release duly executed and recorded.[4] Wherever

[1] Boxheimer v. Gunn, 24 Mich. 372.

[2] Porter v. Hill, 9 Mass. 34; Perkins v. Pitts, 11 Mass. 125; Pearce v. Savage, 45 Me. 90.

[3] Ala Code, 1876, §§ 2222, 2223; Arizona Ter. Comp. Laws, 1877, §§ 281-284; Ark. Dig. 1884, § 4745; Cal. Hitt. Code, 1876, § 7938; Colo. Gen. Stat. 1883, § 234; Dakotah Civil Code, 1883, § 1735; Del. Code, 1874, ch. 83, § 22; Fla. Dig. 1881, ch. 153, § 14; Idaho Rev. Laws, 1875, p. 603; Ill. Rev. Stat. 1883, ch. 95, § 8; Ind. Rev. Stat. 1881, § 1090, and see Smith v. Lowry (Ind.), 15 N. E. Rep. 17; Iowa Code, 1880, § 3327; Dassler's Kan. Stat. 1879, ch. 68, §§ 5-8; Me. Rev. Stat. 1883, ch. 90, § 28; Md. Code, 1878, art. 44, § 39; Mass. Pub. Stat. 1882, ch. 120, § 24; Mich. Comp. Laws, 1882, § 5701; Minn. Stat. 1878, ch. 40, § 36; Miss. Rev. Code, 1880, § 1206; Mo. Rev. Stat. 1879, § 3311; Montana Ter. Code, 1872, p. 402; Neb. Comp. Stat. 1881, Pt. 1, ch. 73, art. 26; Nev. Comp. Laws, 1873, §§ 263-266; N. J. Rev. Stat. 1877, p. 706; N. C. Code 1883, § 1271; Ohio Rev. Stat. 1880, § 4135; Oreg. Gen. Laws 1872, p. 519; Penn. Brightley's Purdon's Dig. 1872, p. 481; R. I. Pub. Stat. 1882, ch. 176, § 6; Vt. Rev. Laws, 1880, § 1950; Wis. Rev. Stat. 1878, ch. 100, §§ 2247-2256; Wyoming Ter. Comp. Laws, 1876, ch. 3, §§ 24-27.

[4] A quitclaim deed executed by the mortgagee to the mortgagor, conveying the premises described in the mortgage, operates at least a *prima facie* release of the mortgage. Hill v. West, 8 Ohio, 222; Waters v. Waters, 20 Iowa, 363. Although the mortgagee has also acquired some other interest in the land upon which the conveyance might operate, it passes his entire interest. Woodbury v. Aiken, 13 Ill. 639. And see Donlin v. Bradley (Ill.), 10 N. E. Rep. 11. But where a mortgagee derived an independent title to the mortgaged premises by an assignment to himself of a subsequent mortgage thereon, a discharge of the original mortgage, written upon it, whereby he released and forever

the common-law character of a mortgage is retained, a discharge should either be by deed, or by an entry upon the record in the manner provided by statute.[1] But no particular form of words is required to effect a release. An acknowledgment upon the back of the mortgage, that the condition thereof has been complied with and that all obligations therein have been discharge, under the hand and seal of the mortgagee, is a discharge of the mortgage.[2] A release of a mortgage, though void at law, if not under seal, may yet be enforced in equity.[3] And in some of the States it has been held that a mortgagee may release his mortgage by a sufficient parol agreement, although the mortgage be under seal and the debt unpaid.[4] But such an agreement, in order to be effectual, must be established beyond a reasonable doubt.[5] In those States, at least, in which the equitable view of a mortgage is adopted, no reason is perceived why a release should be required to be under seal. If properly executed and acknowledged, so as to be admitted of record, this would seem to be all-sufficient. Regard must be had, however, to the language of the statute.

§ 492. **The Effect of a Partial Release of a Mortgage.**— A release of a mortgage may be limited in its operation to a particular person or demand,[6] or to a particular portion

quitclaimed all his "right, title and interest in and to the within described premises," it was held to pass only his interest in that mortgage, and not his entire interest. Barnstable Savings Bank v. Barrett, 122 Mass. 172.

[1] Thornton v. Irwin, 43 Mo. 153. See Valle v. American Iron Mountain Co., 27 Mo. 455.

[2] Allard v. Lane, 18 Me. 9.

[3] Headley v. Goundry, 41 Barb. 279.

[4] Willis v. Long, 16 Ala. 738. See Ackla v. Ackla, 6 Pa. St. 228.

[5] Stevenson v. Adams, 50 Mo. 475.

[6] Where a mortgagee, in pursuance of a stipulation in the mortgage to that effect, gave a release in favor of the United States to enable the mortgagor to commence the distillery business, which stipulated "that the lien of the United States for taxes and penalties should have priority of said above mentioned mortgage, and in case of the forfeiture of the distillery premises, or any part thereof, the title shall vest in the United

of the mortgaged premises, and in the absence of intervening rights in others, will not affect the mortgage lien as to the portion not discharged. As between the original parties, a release of a part of mortgaged premises does not in any manner affect the lien of the residue. So far as it relates to them, every part of the mortgaged property is bound for the payment of the whole debt.[1] But, as against others who have acquired interests in the mortgaged property, a mortgagee, who has notice thereof, has no right to release any portion of the premises to the prejudice of any such interests.[2] Where several mortgaged parcels have been transferred to different persons, the burden is upon the whole land and should be shared equally. If the mortgagee releases one of the parcels, he thereby deprives the other owners of their right to contribution, and he must, therefore, in effect, make contribution, by abating so much of the sum due on the mortgage as the value of the portion released bore, at the time of the execution of the mortgage, to the value of the whole estate.[3] But before the mortgagee can be effected by the subsequently acquired rights of others, he must have notice of such rights. And the notice must be actual, or at least such as would put a man of ordinary prudence upon inquiry. The mere recording of a subsequent conveyance by the mortgagor of a

States, discharged from said mortgage, and for that purpose the said party of the first part does hereby remise, release," etc., which was duly recorded: *Held*, as against a party claiming title under a junior incumbrance, that the instrument did not operate as a general release of the premises from the prior mortgage, but that its only effect was to give the government a priority of lien. Flower v. Elwood, 66 Ill. 438.

[1] Contant v. Servoss, 3 Barb. 128; Taylor v. Short, 27 Iowa, 361; Edgington v. Hefner, 81 Ill. 341; McAfee v. McAfee (S. C.), 5 S. E. Rep. 593; Jordan v. Sayre (Fla.), 3 South. Rep. 329.

[2] McLean v. Lafayette Bank, 3 McLean, 587; Wolf v. Smith, 36 Iowa, 454; Paxton v. Harrier, 11 Pa. St. 312; Blair v. Ward, 10 N. J. Eq. 119; Johnson v. Johnson, 8 N. J. Eq. 561; Coyle v. Davis, 20 Wis. 564; Birnie v. Main, 29 Ark. 591.

[3] Parkman v. Welch, 19 Pick. 231; Cheesebrough v. Millard, 1 Johns. Ch. 409; Stevens v. Cooper, 1 Johns. Ch. 300; Gibson v. McCormick, 10 Gill. & J. 65. See Hicks v. Bingham, 11 Mass. 300.

part of the premises, would not be sufficient to charge the mortgagee with notice.[1] If the mortgagee has received the full value of the parcel released, and credited the amount upon the mortgage, the owners of the other parcels would, of course, have no further claim to contribution. Neither would they, if a fair ratable proportion of the mortgage debt was so received and credited, unless the mortgage is primarily chargeable upon the part so released, in exoneration of the other parcels. We have seen that if a mortgagor sells a portion of the mortgaged premises by warranty deed, the debt is primarily chargeable upon the portion remaining in his hands. It is a rule in equity that when lands incumbered by a mortgage are subdivided, and conveyed to different persons at different periods of time, that portion, which is conveyed last by the incumbrancer is to be first called upon to contribute for its full value towards satisfying the incumbrance; and thus each portion is to bear its proportion of the burden in the inverse order of the time of its alienation.[2] Therefore, if a mortgagee, with notice of several successive alienations of parts of the mortgaged premises, releases that part which is primarily liable in equity for the payment of the mortgage debt, he cannot charge other portions of the premises with the payment of the mortgage, without deducting from the amount due, the full value of the part thus released.[3]

§ 493. **A Discharge Obtained by Fraud or Made Through Mistake.**—It is a familiar doctrine in equity that a discharge of a mortgage obtained by fraud, or made through a mistake of fact, will be canceled; provided other parties, having no notice of the fraud or mistake, have not acquired rights

[1] Patty v. Pease, 8 Paige, 277; Straight v. Harris, 14 Wis. 509; Deuster v. McCamus, 14 Wis. 307; George v. Wood, 9 Allen, 80; Brown v. Simons, 44 N. H. 475.

[2] Gouverneur v. Lynch, 2 Paige, 300; Patty v. Pease, 8 Paige, 277; Guion v. Knapp, 6 Paige, 35. *Ante*, § 467.

[3] Guion v. Knapp, 6 Paige, 35; Hoy v. Bramhall, 19 N. J. Eq. 74, 563; Johnson v. Rice, 8 Me. 157; Iglehart v. Crane, 42 Ill. 261. But see Holman v. Bank of Norfolk, 12 Ala. 369.

in respect to the property upon faith of the record of such discharge.[1] A release which has never been delivered, but which has been stolen or obtained by fraud from the depository, or by accident or mistake has been placed upon record, is, of course, of no validity, even in favor of an innocent purchaser.[2] And the same would be true of an unauthorized cancellation of a mortgage by the recorder.[3] But where a mortgagee has been induced by fraud to deliver the release, or to enter a discharge upon the record, he is bound by his act in favor of one who has purchased the mortgaged premises in good faith, relying upon the discharge as it appeared of record.[4] In regard to who are entitled to the protection afforded by the record, it has been held that a subsequent mortgagee, or judgment creditor, whose rights existed at the time of the discharge, are not so entitled.[5] Nor a purchaser from the mortgagor, who has parted with no new consideration since the release.[6] But it seems that a purchaser at execution or judicial sale, who buys subsequent to the entry of the satisfaction of record, and without notice of the fraud, would be protected by the record, even though the purchaser is the judgment creditor.[7]

[1] McLean v. Lafayette Bank, 3 McLean, 587; Banta v. Vreeland, 15 N. J. Eq. 103; Barnes v. Camack, 1 Barb. 392; Hollenbeck v. Shoyer, 16 Wis. 499; Weir v. Mosher, 19 Wis. 311; Bruse v. Nelson, 35 Iowa, 157; Dudley v. Bergen, 23 N. J. Eq. 397; Stover v. Wood, 26 N. J. Eq. 417; West's Appeal, 88 Pa. St. 341; Vannice v. Bergen, 16 Iowa, 555; Ellis v. Lindley, 37 Iowa, 334; Bruce v. Bonney, 12 Gray, 107. A mistake, to authorize the cancellation of a discharge, must be a mistake as to matter of fact and not as to a question of the law. Bentley v. Whittemore, 18 N. J. Eq. 366.

[2] Stanley v. Valentine, 79 Ill. 544. A discharge of a mortgage, procured by fraud, is void as between the parties and subsequent purchasers with notice; and if the fraud amount to a felony, it is void, and the mortgage good against the world. Fassett v. Smith, 23 N. Y. 252.

[3] Harris v. Cook, 28 N. J. Eq. 345. See Mallett v. Page, 8 Ind. 364.

[4] Heyder v. Excelsior Building Association (N. J.), 8 Atl. Rep. 310.

[5] Downer v. Miller, 15 Wis. 612; Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; Robinson v. Sampson, 23 Me. 388.

[6] Ellis v. Lindley, 37 Iowa, 334; Reagan v. Hadley, 57 Ind. 509.

[7] Vannice v. Bergen, 16 Iowa, 555.

CHAPTER XII.—Foreclosure.

Article I. When the Right of Foreclosure Exists.
II. Various Methods of Enforcing a Mortgage.
III. Foreclosure by sale under Power Contained in the Mortgage.

ARTICLE I.

WHEN THE RIGHT OF FORECLOSURE EXISTS.

SECTION.
496. At what time the right accrues.
497. When barred by limitation.

§ 496. **At what Time the Right Accrues.**—Of course a mortgage cannot be foreclosed until it has become due, or there is a breach of some of the conditions of the instrument.[1] And where the time for payment has been extended

[1] Harshaw v. McKesson, 66 N. C. 266; Morris v. Tutkill, 72 N. Y. 575. Where a mortgagee, whose debt secured by mortgage is not due, is made a defendant in a suit to foreclose a subsequent mortgage, securing a debt which is due, and files a cross-complaint setting up such prior mortgage, and asking its foreclosure, the court may decree the foreclosure of the subsequent mortgage, and order a sale of the property mortgaged, subject to the lien of the prior mortgage, but cannot foreclose the prior mortgage or order a sale to satisfy it. Trayser v. Trustees Indiana Asbury University, 39 Ind. 556. Where a condition precedent, requiring a defective title to a portion of lands, mortgaged to secure purchase-money, to be perfected by the vendor before the debt should

by a valid agreement, the right to foreclose is suspended until the expiration of the time to which payment was agreed to be extended.[1] And it has been held that receipt, after foreclosure, of part of the debt, is a waiver of the foreclosure, especially if so agreed.[2]

As to when a breach of condition will be considered to have taken place by lapse of time, the reader is referred to a former part of this work.[3] We have heretofore noticed, also, that the right to foreclose may be made to depend upon other events than the mere lapse of time; such as failure to pay interest when due, to keep the premises in repair, to pay taxes, or to keep the premises insured for the benefit of the mortgagee. And a breach of any of these conditions is as effectual to work a forfeiture, and to authorize a foreclosure, as a failure to pay the principal when due.[4] And a provision that, upon default in the payment of any instalment of principal or interest, or upon the breach of any of the conditions of the mortgage, the principal sum shall immediately become due, is valid and binding; and upon any such default a foreclosure may be had for the entire amount remaining unpaid.[5] Where the condition is that, upon default in the payment of any instalment of interest or principal, the whole debt shall become due at the option

be deemed due and payable, was not performed, it was held that no foreclosure could be had of that portion of the debt accruing from the purchase of the land, so embraced in the condition; but the purchaser would be entitled to a deduction from the amount due and unpaid, in proportion to the value of this tract as compared with the value of the tract sold. Weaver v. Wilson, 48 Ill. 125.

[1] Loomis v. Donovan, 17 Ind. 198; Trayser v. Trustees Indiana Asbury University, 39 Ind. 556; Tompkins v. Tompkins, 21 N. J. Eq. 338. An agreement made subsequently to a mortgage, extending the time of payment, is no part of the mortgage, and hence does not draw the mortgage within an act forbidding foreclosure of mortgages until one year after the last instalment is due. Wallace v. Hussey, 63 Pa. St. 24.

[2] Dow v. Moor, 59 Me. 118.

[3] *Ante*, § 445.

[4] *Ante*, Chap. IX., Art. VI.

[5] Terry v. Eureka College, 70 Ill. 236; Fisher v. Milmine, 94 Ill. 328.

of the mortgagee, the whole debt does not become due until the mortgagee has exercised his election. The condition being indivisible, an assignee of part of the notes secured by the mortgage cannot alone exercise such option.[1] But an assignee of the entire debt may exercise this option in the same way as the mortgagee himself may.[2]

It is not necessary that any particular form of expression should be used in declaring such option. Thus, where the deed executed by the mortgagee, who sold under the power in the mortgage, recited that the mortgagee, "having elected to declare said mortgage due and payable, as by the said mortgage he was authorized to do, according to the terms and conditions thereof," this was held sufficient.[3] The mere fact of his proceeding to foreclose the mortgage is, generally, sufficient to show the election of the mortgagee, to treat the entire debt as due. But in Wisconsin, it has been held that he must give notice of such election, before beginning a suit for the whole sum.[4] In the absence of any agreement, either express or implied, that, upon a default in the payment of a part of the debt a foreclosure may be had for the whole amount, in a suit to foreclose, brought before the maturity of the whole debt, a court of equity will generally decree a sale of so much of the premises only as will be sufficient to satisfy the amount then due, and the decree will stand as security for the amounts to become due. But if the property is indivisible, or the court should be satisfied that it would sell for a better price if sold together in one lot, than if sold in parcels at different times, the sale may be of the whole estate for paying so much as may be due at the date of the decree, and for securing the payment of the residue as it shall become due.[5]

[1] Marine Bank v. International Bank, 9 Wis. 57. And see Mallory v. West Shore Hudson River R. R. Co., 35 N. Y. Sup. Ct. 174.

[2] Heath v. Hall, 60 Ill. 344; Princeton Loan and Trust Co. v. Munson, 60 Ill. 371.

[3] Harper v. Ely, 56 Ill. 179.

[4] Basse v. Galleggar, 7 Wis. 142.

[5] Bank of Ogdensburg v. Arnold, 5 Paige, 38; Caufman v. Sayre, 2 B.

But if, upon a foreclosure for an instalment due before the principal amount, the whole of the property is sold, the remedy upon the mortgage is exhausted, and there can be no second sale upon the maturing of the principal[1]—unless the sale was made expressly subject to the notes afterwards to become due.

In general, the condition of a mortgage, given to indemnify a surety against loss or damage from payment of the debt, is not broken until he has paid the debt,[2] or sustained actual damage.[3] But where the condition was that the mortgagor "shall promptly pay and discharge all notes or other papers of his upon which the mortgagees shall become indorsers or acceptors, together with all interest, costs and charges accruing thereon, so as to save said parties of the second part harmless by reason of their connection with such paper," the condition was held to be broken at once on a failure to pay the paper at maturity, and that a right to foreclose accrued, without further action upon the part of the mortgagee.[4]

Where a mortgage is given as security for the maintenance and support of the mortgagor, there being no stipulation as to the place where he is to receive the support, he has a right to be supported wherever he may choose to live, provided that he do not create any needless expense to the mortgagee or those claiming under him.[5] And the condition of such a mortgage is broken, if the mortgagee

Mon. 202; Peyton v. Ayres, 2 Md. Ch. 64; Booknau v. Burnett, 49 Iowa, 303. And see Kemerer v. Bournes, 53 Iowa, 172.

[1] Buford v. Smith, 7 Mo. 489; Poweshiek Co. v. Dennison, 36 Iowa, 244; Minor v. Hill, 58 Ind. 176.

[2] Lewis v. Richey, 5 Ind. 152; Francis v. Porter, 7 Ind. 213; Ohio Life Ins. and Trust Co. v. Reeder, 18 Ohio, 35; McLean v. Ragsdale, 31 Miss. 701.

[3] As where he has been exposed to suit and trouble. Shaw v. Loud, 12 Mass. 461. Or imprisonment for debt. Powell v. Smith, 8 Johns. 248. See Kramer v. Farmers' etc. Bank, 15 Ohio, 253.

[4] Butler v. Ladue, 12 Mich. 173.

[5] Wilder v. Whittemore, 15 Mass. 262; Flanders v. Lamphear, 9 N. H. 201; Rhodes v. Parker, 10 N. H. 83.

after knowledge that the mortgagor is at a reasonable place where he intends to receive his support, declares his intention not to pay his board there, and afterwards neither pays nor offers to pay any part thereof, although no special demand has been made upon him for such support.[1] And where the condition of a mortgage was to indemnify the mortgagee against the support of a third person, it was held a sufficient breach that the mortgagee was compelled to pay for such support for a part of the time.[2] But it is not sufficient proof of a breach of a bond to support another during his natural life, to show that he left the house of the person bound to furnish such support, and resided elsewhere for several years, without at any time requesting him to fulfill his agreement, or in any way exhibiting to him an intention or desire to hold him to the performance thereof.[3] And where the person to be supported wandered off to another town, and was there supported as a pauper, it was held that the refusal of the mortgagor to pay the expenses did not constitute a breach of the condition, there being no evidence that he was in fault.[4]

§ 497. **When the Right of Foreclosure is Barred by Limitation.**—The right of the mortgagor to redeem, and of the mortgagee to foreclose the mortgage, being mutual and reciprocal, it follows that the same period of limitation is a bar in the one case as in the other. Consequently, what has been said on the former subject will be equally applicable here.[5] It was there noticed that, by analogy to the English statute fixing the limitation of the right of entry at twenty years, the same period of limitation was adopted in equity as a bar to the right to redeem. So, on the other hand, if the mortgagor, after condition broken, has continued in the adverse possession of the mortgaged premises for twenty years, without having recognized the mortgage

[1] Pettee v. Case, 2 Allen, 546.
[2] Whitton v. Whitton, 38 N. H. 127.
[3] Jenkins v. Stetson, 9 Allen, 128.
[4] Rhodes v. Parker, 10 N. H. 83.
[5] *Ante*, § 477.

as an existing incumbrance, the presumption arises that the debt has been paid, and the right to foreclose will, ordinarily, be barred.[1] And in those States in which the statutory period of limitation has been reduced to less than twenty years, following the analogy to the statute, a corresponding period is adopted in equity as a bar to the right to redeem or to foreclose a mortgage.[2]

The statute of limitations, as we have seen, does not, according to the prevailing doctrine, constitute a strict bar to equitable claims; but equity simply adopts the statutory period as the time at which the presumption of payment arises.[3] This presumption is not conclusive, but may be controlled by any evidence having a tendency to rebut it; as the part payment of principal or interest, a new promise, or any circumstance which tends to show that the debt is unpaid.[4] But evidence to overcome this presumption

[1] Thayer v. Mann, 19 Pick. 535; Inches v. Leonard, 12 Mass. 379; Bacon v. McIntire, 8 Mete. 87; Roberts v. Welch, 8 Ired. Eq. 287; Haskell v. Bailey, 22 Conn. 569; Elkins v. Edwards, 8 Ga. 326; Giles v. Baremore, 5 Johns. Ch. 545; Richmond v. Aiken, 25 Vt. 324; Hughes v. Edwards, 9 Wheat. 489; Nevitt v. Bacon, 32 Mass. 212; Chick v. Rollins, 44 Me. 104; Fry v. Shehee, 55 Ga. 208; Tripe v. Marcy, 39 N. H. 439; Harris v. Mills, 28 Ill. 46. The statute begins to run from the time the condition of the mortgage is broken. Wilkinson v. Flowers, 37 Miss. 579; Prouty v. Eaton, 41 Barb. 409.

[2] Gunn v. Brantley, 21 Ala. 633; Crawford v. Taylor, 42 Iowa, 260; Field v. Wilson, 6 B. Mon. 479; Richmond v. Aiken, 25 Vt. 324; *ante*, § 477. To bar a proceeding to foreclose a mortgage, there must be an adverse holding for such a period as would bar an action of ejectment. The fact that the statute has attached to the debt secured by the mortgage, will not affect a proceeding to foreclose; and in order to constitute an adverse holding in favor of the mortgagor, there must be an open and notorious denial of the mortgagee's title. Birnie v. Main, 29 Ark. 591; Wood v. Augustine, 61 Mo. 46.

[3] *Ante*, § 477.

[4] Howard v. Hildreth, 18 N. H. 106; Heyer v. Pruyn, 7 Paige, 465; Hughes v. Edwards, 9 Wheat. 490; Wright v. Eaves, 10 Rich. Eq. 582; Cheever v. Perley, 11 Allen, 584. A purchaser of the mortgaged premises, who accepts a conveyance which recites that the premises are subject to the mortgage, thereby recognizes the mortgage, and cannot set up the statute of limitations, except from that date; and a purchaser from him is bound by the admission. Harrington v. Slade, 22 Barb. 161; Palmer v. Butler, 36 Iowa, 576; Schmucker v. Sibert, 18 Kan. 104.

should be positive and unequivocal.[1] When a payment of interest or a part of the principal has been made, or the debt otherwise clearly recognized as subsisting, the effect is to renew the mortgage from that date. And it matters not that the mortgagor may have parted with a portion of the equity of redemption in the meantime. The purchaser stands in the same position with the mortgagor, and is bound by his acts and declarations in respect to the existence of the debt.[2] So, where there are several persons interested in the equity of redemption, a part payment, made by any one of them, stops the running of the statute as to all.[3] But when the note and mortgage are once barred, a part payment, promise or acknowledgment by the mortgagor or a part owner of the mortgaged premises will revive the mortgage so as to affect the interest of the payor only. It will not revive it as against a purchaser from the mortgagor, or any other parties who have acquired interests in the mortgaged premises prior to the revivor of the note.[4]

The effect of the running of the statute is merely to take away the remedy, and not to discharge the debt; hence, the fact that the debt is barred does not extinguish the mortgage. The remedies upon the debt and the mortgage are separate and distinct. A mortgage security has not, in general, been deemed to be within any branch of the statute of limitations. The security exists until the debt is paid, or until the presumption of payment arises from lapse of time. It cannot be defeated by showing merely that the personal security, to which the mortgage security is collateral, has become barred by statute.[5] This is the prevail-

The right of a mortgagor to plead the statute of limitations on foreclosure is personal, and does not pass to subsequent incumbrancers. Wild v. Stephens, 1 Wy. Ter. 366.

[1] Jarvis v. Albro, 67 Me. 310

[2] Hughes v. Edwards, 9 Wheat. 489; Heyer v. Pruyn, 7 Paige, 465. Otherwise in California, where it is held that the mortgagor has no power to suspend the running of the statute as against others who have become interested in the land. Wood v. Goodfellow, 43 Cal. 185.

[3] Harrington v. Slade, 22 Barb. 161.

[4] Schmucker v. Sibert, 18 Kan. 104.

[5] Thayer v. Mann, 19 Pick. 535; Joy v. Adams, 26 Me. 333; Cape Gir-

ing doctrine; but in some of the States, the statutes of limitation apply in equity in the same manner as at law, and it has been held upon the construction of such statutes, that the remedy upon the mortgage is gone whenever the debt is barred.[1] Other courts, proceeding upon the theory that the debt is the principal thing, and the mortgage a mere incident, have adopted the same rule.[2] And this conclusion would seem to follow as a natural consequence, wherever a mortgage is regarded as a mere lien, and not as an estate in land.

ARTICLE II.

VARIOUS METHODS OF ENFORCING A MORTGAGE.

SECTION.

500. The extent of the present article.
501. Remedies in the different States.
502. Foreclosure by suit in equity.
503. By proceedings at law.
504. By entry and possession.

§ 500. **The Extent of the Present Article.**—The term "foreclosure" applies, strictly, to the process by which the right of the mortgagor to redeem is finally cut off and

ardeau Co. v. Harbison, 58 Mo. 90; Wood v. Augustine, 61 Mo. 46; Michigan Ins. Co. v. Brown, 11 Mich. 265; Powell v. Smith, 30 Mich. 451; Bank of Metropolis v. Guttschlick, 14 Pet. 19; Birnie v. Main, 29 Ark. 591; Whipple v. Barnes, 21 Wis. 327; Wilkinson v. Flowers, 37 Miss. 579; Heyer v. Pruyn, 7 Paige, 465. But see Crooker v. Holmes, 65 Me. 195; Ball v. Wyeth, 8 Allen. 275; Jackson v. Sackett, 7 Wend. 94.

[1] Lord v. Morris, 18 Cal. 482. See Newman v. DeLorimer, 19 Iowa, 244; Hendershott v. Ping, 24 Iowa, 134; Chick v. Willetts, 2 Kan. 384; Schmucker v. Sibert, 18 Kan. 104; Jordan v. Sayre (Fla.), 3 South. Rep. 329.

[2] Medley v. Elliott, 62 Ill. 532; Cower v. Winchester, 33 Iowa, 303; Hurley v. Estes, 6 Neb. 386; Ross v. Mitchell, 28 Tex. 150; First Nat. Bank v. Thomas (Ky.), 3 S. W. Rep. 12; Bitter v. Calhoun (Tex.), 8 S. W. Rep. 523.

extinguished. Besides the right of foreclosure, the mortgagee has a personal remedy against the mortgagor; and, wherever the common-law doctrine of mortgages prevails, he has also a right of action for the recovery of the possession of the land. And these may, generally, be pursued concurrent with a bill to foreclose.[1] But as these topics belong rather to the subject of remedy than to conveyancing, it is not proposed to consider them here.

There are also various modes of effecting a foreclosure in the different States, which more properly come under the head of actions and defenses, although they operate to some extent as conveyances. These we shall notice but briefly, treating at greater length that method of foreclosure which belongs more exclusively to conveyancing, *i. e.*, by sale under a power contained in the mortgage.

§ 501. **Remedies for Enforcing Mortgages in the Different States.**—As before stated, there are various remedies for enforcing mortgages in the different States, in some of which the proceedings are at law, and in others, in equity.[2] Whatever may be the process prescribed by the law of the State where the land is situated, it must be followed.[3] An agreement in the mortgage itself that it should be foreclosed in any other manner, would be void and of no effect.[4] It must also be foreclosed in accordance with the law in force at the time of its execution. This is taken to be a part of the contract, and any subsequent change by statute, affecting the rights or interest of the mortgagee, would be a law impairing the obligation of the contract, and

[1] Hale v. Rider, 5 231; 4 Kent Com. 183, 184; Ely v. Ely, 6 Gray, 439; Jones v. Conde, 6 Johns. Ch. 77; Very v. Watkins, 18 Ark. 546; Payne v. Howell, 40 Miss. 498; Torrey v. Cook, 116 Mass. 163; Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603. But a judgment recovered for the debt cannot, in general, be levied upon the mortgaged property, though it may be levied upon any other property of the debtor. Washburn v. Goodwin, 17 Pick. 137; Tice v. Annin, 2 Johns. Ch. 125; Jones on Mortgages, § 1229, and cases cited.

[2] See Stimson's Amer. Stat., § 1920.

[3] Elliott v. Wood, 45 N. Y. 71.

[4] Chase v. McLellan, 49 Me. 378.

could not, therefore, be applied.[1] The various remedies for enforcing mortgages in the several States, excepting that of a sale under power, may be classed under three general heads, namely: foreclosure by suit in equity; by proceedings at law; and by entry and possession. Each of these will be noticed briefly in the order named.

§ 502. **Foreclosure by Suit in Equity.**—The foreclosure and redemption of mortgages are subjects peculiarly within the jurisdiction of courts of equity. And although other remedies are adopted for the foreclosure of mortgages in different States, courts of equity generally retain their jurisdiction, and may be resorted to, at least, whenever the circumstances of the particular case require specific relief, or a more complete remedy than is otherwise afforded.[2]

The ancient mode of foreclosing a mortgage, and which is still in use in England and in some of the United States, was by bill in equity praying for a foreclosure of the mortgagor's right of redemption; the decree being that, unless the party having the equity of redemption shall, within a prescribed time, usually six months, pay the sum found to be due on the mortgage and redeem the estate, he shall be forever barred from redeeming;[3] and upon default in such payment, the land becomes the absolute property of the

[1] Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Clark v. Reyburn, 8 Wall. 318; Williamson v. Doe, 7 Blackf. (Ind.) 12; Ogden v. Walters, 12 Kan. 882.

[2] Shaw v. Norfolk R. R. Co., 5 Gray, 162, 183. The fact that a mortgage contains a power of sale does not oust the jurisdiction of a court of equity to enforce it. McGowan v. Branch Bank of Mobile, 7 Ala. 822; Corradine v. O'Connor, 21 Ala. 573; Walton v. Dody, 1 Wis. 420; Byron v. May, 2 Chand. (Wis.) 103. Neither does the fact that there is a statutory remedy. Benjamin v. Cavaroc, 2 Woods, 168; Riley v. McCord, 24 Mo. 265. But in Maine, it seems, a court of equity has no jurisdiction to foreclose a mortgage. The process of foreclosure is by entry and possession. Shaw v. Gray, 23 Me. 174; Ireland v. Abbott, 24 Me. 155; Chase v. Palmer, 28 Me. 341. But see Woods v. Woods, 66 Me. 206.

[3] It is essential to the validity of the decree that a certain time be given within which the mortgagor may redeem. Clark v. Reyburn, 8 Wall. 323.

mortgagee.[1] This was the form of foreclosure first adopted by the courts of equity, and for a long time was the only form in common practice, though the power of a court of chancery to decree a sale of the land instead of a foreclosure, in certain cases, was early established.[2] In this country, the practice of selling on foreclosure has come to be almost universal, and strict foreclosure is only resorted to in special cases,[3] and in some of the States, is entirely unknown.[4] But in Vermont, Connecticut and Nebraska a decree of strict foreclosure appears to be the usual form.[5]

When the practice is to foreclose without a sale, its severity is mitigated by enlarging the time for redemption from time to time, according to the equity arising from the circumstances of the particular case.[6] But a decree of sale is esteemed preferable in most cases, as being better adapted to the relative situation of lender and borrower, and to produce equitable and fair results to both parties.[7] The land

[1] The effect is to extinguish the right of redemption and vest the entire estate in the mortgagee. Brainard v. Cooper, 10 N. Y. 359; Bradley v. Chester Valley R. R. Co., 36 Pa. St. 150.

[2] The right to compel a sale of the mortgaged premises is spoken of by Blackstone as among the rights of a mortgagee. 2 Bl. Com. 159. And see 2 Story's Eq., §§ 1024-1026.

[3] Bolles v. Duff, 43 N. Y. 469. Where a bill for a foreclosure shows that the mortgage was given for the entire purchase-money, no part of which, or of the interest had been paid; and that the value of the premises does not exceed the amount due, and they are but a slender, and only security for the debt, the mortgagors having absconded, a strict foreclosure is not improper. Wilson v. Geisler, 19 Ill. 49. It is only in strong cases which form exceptions, that there should be decreed strict foreclosure or a sale without redemption. Farrell v. Parlier, 50 Ill. 274; Boyer v. Boyer, 89 Ill. 447; Griesbaum v. Baum, 18 Ill. App. 611. A decree of strict foreclosure which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot, unless authorized by some special statute, be sustained. Clark v. Reyburn, 8 Wall. 318.

[4] Davis v. Holmes, 55 Mo. 349; Gannunt v. Gregg, 37 Iowa, 573.

[5] Paris v. Hulett, 26 Vt. 308; Palmer v. Mead, 7 Conn. 149; Woods v. Shields, 1 Neb. 453.

[6] 4 Kent Com., 182.

[7] See Mills v. Dennis, 3 Johns. Ch. 367; Wilder v. Haughey, 21 Minn. 101; Lansing v. Goelet, 9 Cow. (N. Y.) 352.

being sold, the proceeds are applied first to the payment of the mortgage debt, and the surplus, if any, paid to the debtor or his assigns; or, if a balance of the debt remains unpaid after applying the proceeds of the property, the mortgagee may have an action for its recovery.[1] In most of the States where foreclosure is effected by judicial sale, there are statutes regulating the mode of procedure which must, of course, be followed.[2] Any general observations on the subject would be better calculated to confuse than to instruct the practitioner in such cases. It may be suggested, however, that all persons having an interest in the object and result of the suit, ought, generally, to be made parties to a bill to foreclose,[3] since persons interested, who are not made parties, are not bound by the decree. But the question of parties is more or less fluctuating, and is governed in some degree by the circumstances.[4]

§ 503. **Foreclosure by Proceedings at Law.**—In several of the States the proceedings under the statute, for the foreclosure of mortgages, are at law, and not in equity. In such States a judgment may generally be rendered, not only for a sale of the property, but also for any balance of the debt remaining after the sale, thus avoiding the necessity of two suits.[5] It is familiar that in several of the

[1] Personal judgment cannot be taken against the defendant in a foreclosure suit, until it appears, from the sheriff's return, that a balance remains due after a sale of the mortgaged premises. Hunt v. Dohrs, 39 Cal. 304. In a bill to foreclose a mortgage, an assignee of a part of the mortgage debt may be joined as a party. Beebe v. Morris, 56 Ala. 525.

[2] Grover v. Fox, 36 Mich. 461.

[3] Williams v. Russell, 19 Pick. 162; Hallett v. Hallett, 2 Paige, 15; Montcalm v. Smith, 6 McLean, 416; Koger v. Weakley, 2 Porter (Ala.), 516; Belloc v. Rogers, 9 Cal. 123; Martin v. Noble, 29 Ind. 216; Hall v. Hall, 11 Tex. 526. In a proceeding to foreclose a junior mortgage, the mortgagee under a senior mortgage is not a necessary party. White v. Holman, 32 Ark. 753.

[4] For a comprehensive view of the subject of parties to an equitable suit for foreclosure, see Jones on Mortgages, § 1367, *et seq.*

[5] The following cases are cited as illustrative of the above proposition, rather than as representing the only States in which this is the law:

States the distinction between actions at law and suits in equity has been abolished by the adoption of the code system. In those States also, there is usually but one action for the recovery of the debt and the enforcement of the mortgage, in some of which the proceedings are in the nature of a bill in equity, while in others they are governed by the practice in courts of law. The great diversity in the details of such proceedings renders any attempt at stating them impracticable.

In those States in which foreclosure is effected by entry and possession, there is a process by which possession may be obtained, called a Writ of Entry, which is an action at law; though it partakes, in many respects, of the nature of a bill in equity.[1] For the rules governing the proceedings in this action, recourse must be had to the practice of the States where this form of foreclosure is used.

§ 504. **Foreclosure by Entry and Possession.**—In Maine, Massachusetts, New Hampshire and Rhode Island, the usual remedy of the mortgagee to foreclose his mortgage is by an entry *in pais*, or by the prosecution of a writ of entry, as before noticed. Possession gained in either way, if continued a certain prescribed period of time, usually three years, works a foreclosure.[2] The statutory provisions in respect

Judge v. Forsyth, 11 Fla. 257; Dickerson v. Powell, 21 Ga. 143; Hunt v. Dohrs, 39 Cal. 304; Birnie v. Main, 29 Ark. 591. Under the Missouri code of procedure, to enable one to foreclose a mortgage and obtain a general judgment and execution for any balance that may remain due after sale of the mortgaged premises, the mortgage must be regular; but if it be irregular, as by the omission of any requisite to a complete instrument, still it is held to create a lien—a trust for the benefit of the creditor—which can be enforced in equity. McClurg v. Phillips, 49 Mo. 315. A mortgagee may enforce his mortgage as against the land, notwithstanding the personal liability of the mortgagor for the debt may be barred by a discharge in insolvency. Christy v. Dana, 42 Cal. 174. A mortgagee does not forfeit his right to enforce his mortgage by obtaining a general judgment on the debt, nor by delaying such enforcement till the removal of a prior incumbrance. Kan. City Sav. Assoc. v. Martin, 61 Mo. 435.

[1] Jones on Mortgages, § 1276.

[2] Davis v. Rogers, 64 Me. 159. A foreclosure of the mortgage contemplated is payment of the mortgage debt, in contemplation of law, to the

to the entry, notice and the evidence of possession differ in some essential particulars in each of those States. Consequently, in the foreclosure of a mortgage in either, recourse must be had to the local statutes and the decisions of the courts under them for the rules governing the proceedings.[1]

ARTICLE III.

FORECLOSURE BY SALE UNDER POWER.

SECTION.

507. The scope of the present article.
508. Power of sale a cumulative remedy.
509. When its exercise will be enjoined.
510. Who may exercise the power.
511. What notice is to be given.
512. Requisites of the notice.
513. Conduct of the sale.
514. Who may purchase.
515. The deed.

§ 507. **The Scope of the Present Article.**—The nature of a power of sale, its form and construction generally, have already been discussed.[2] It only remains, therefore, to notice the method of its execution, or, in other words, of the enforcement of the remedy under it.

§ 508. **Power of Sale a Cumulative Remedy.**—It has also been noticed that a power of sale is a cumulative remedy, and does not stand in the way of foreclosing a mort-

extent of the value of the land at that time. If the mortgagee is not satisfied with it, he may recover any deficiency. But in such case, the foreclosure is re-opened under the Mass. Gen. Statute, 140, § 36. Morse v. Merritt, 110 Mass. 549.

[1] See Railroad Co. v. Elliott, 52 N. H. 387; Jarvis v. Albro, 67 Me. 310; Jones v. Bowler, 74 Me. 310; Stimson's Amer. Stat. §§ 1920, 1930.

[2] *Ante*, §§ 458-461.

gage in any other manner provided by law.[1] It has frequently been held that a power of sale does not deprive a court of chancery of its jurisdiction to foreclose.[2] The mortgagee has his election to foreclose in either way.[3] It is believed to be the common practice in nearly all of the States to resort to equity in the foreclosure of a mortgage, whenever it is defective in the formal requisites of execution, or a question arises as to who is the proper person to exercise the power. So a mortgage, given to secure and cover unliquidated damages, cannot, in general, be foreclosed under a power until the amount due under the mortgage has been ascertained.[4] Either party in interest may resort to a court of equity for that purpose.[5] It has been suggested also that, in view of the embarrassments attending a sale under the power when the mortgage is payable by instalments, the better remedy would be to foreclose in a court of equity in cases of that kind.[6] In like manner,

[1] *Ante*, § 502, note; Jones on Mortgages, § 1773; Thompson v. Houze, 48 Miss. 445.

[2] Carrodine v. O'Connor, 21 Ala. 573; Walton v. Cody, 1 Wis. 420; Comerais v. Genella, 22 Cal. 124; Wofford v. Board Police of Holmes Co., 44 Miss. 579; Myers v. Estell, 48 Miss. 372.

[3] Cormerais v. Genella, *supra;* Bedell v. McClellan, 11 How. Pr. 172; Morrison v. Bean, 15 Tex. 267; Walton v. Cody, 1 Wis. 420. Under a statute which declares that there shall be but one action for the enforcement of a right secured by a mortgage, the mortgagee may advertise and sell in accordance with the terms of a power contained in the mortgage, and thus foreclose without proceeding by action. Bryant v. Carson River Lumbering Co., 3 Nev. 313; Crocker v. Robertson, 8 Iowa, 404; Fanning v. Kerr, 7 Iowa, 450.

[4] Wilkins v. Gordon, 11 Leigh (Va.). 547; Ferguson v. Kimball, 3 Barb. Ch. 616; Moseley v. Hodge, 76 N. C. 387; Ferguson v. Ferguson, 2 Comst. 364. It is not indispensable to the right to sell under the power, that the mortgage should be payable in money alone. When it was given to secure the payment of a debt in specific articles, and the value of the articles was liquidated by the mortgage in case of default, it was held to be equivalent to a mortgage to secure the payment of money. Jacks v. Turner, 7 Wend. 458.

[5] Wilkins v. Gordon, 11 Leigh (Va.), 547. See Holden v. Stickney, 2 McArthur (D. C.), 141.

[6] Willard on Real Estate and Conv., 135; Leonard v. Morris, 9 Paige, 90.

a resort to proceedings in equity frequently becomes necessary under deeds of trust, in order to control, restrain or direct the exercise of the power,[1] or for the substitution of a new trustee whenever the former trustee has died, removed from the jurisdiction, or refuses to act in the execution of the trust.[2]

§ 509. **When the Exercise of a Power of Sale will be Enjoined.**—A court of equity will generally interfere by injunction to prevent a sale under a power in a mortgage or trust deed, when by reason of fraud, want of consideration, or otherwise, the collection of the debt would be against conscience, and the sale would work a great and irreparable injury.[3] But in order to authorize the issuance of the injunction, it must be shown that it is necessary for the protection of rights which are clear, or beyond reasonable doubt; that the injury likely to be sustained by the complainant will be irreparable; or that he is entitled to more immediate relief than can be obtained in any other way.[4] And the party applying for the injunction must tender payment of the amount justly due on the mortgage, upon the principle that he who seeks equity must do equity.[5]

It is well settled that a sale under a mortgage, which was void in its inception, may be enjoined. Thus, in New York,

[1] Youngman v. Elmira, etc. R. Co., 65 Pa. St. 278.

[2] See *ante*, § 458. A sale made by a trustee appointed by the court is by virtue of the power, and not of the decree. Rice v. Brown, 77 Ill. 549; Doolittle v. Lewis, 7 Johns. Ch. 45; Holden v. Stickney, 2 McArthur (D. C.), 141; Staats v. Bigelow, *Id.* 367. A trustee who has once accepted a trust, is not allowed to lay it down without the assent of the beneficiary, or the decree of a court. Drane v. Gunter, 19 Ala. 731. But, if within the jurisdiction of the court, may be compelled to discharge the trust. Sargent v. Howe, 21 Ill. 148.

[3] Greenl. Cruise, 79 n; 2 Story's Eq. Jur., § 885; Kornegay v. Spicer, 76 N. C. 95; Matthie v. Edwards, 2 Call, 465; Platt v. McClure, 3 Woodb. & M. 151.

[4] Montgomery v. McEwen, 9 Minn. 103; Bedell v. McClellan, 11 How. Pr. 172.

[5] Stringham v. Brown, 7 Iowa, 33; Sloan v. Coolbough, 10 Iowa, 31; Meysenburg v. Schlieper, 46 Mo. 209; Tooke v. Newman 75 Ill. 215.

where usury renders void the contract, a sale under a power in a usurious mortgage may be enjoined.[1] And it seems that, in some of the States where usury does not invalidate the mortgage, an injunction would be allowed upon tender of the amount due.[2] But in a late case in Illinois it was held to be no ground for enjoining a sale under a trust deed, that the notes secured thereby reserved usurious interest. The fact that usury is included in the notes in nowise impairs the power or duty of the trustee to make sale, and apply the proceeds in discharge of the debt secured by the deed of trust. "If he should attempt to misapply the fund and pay the notes given for usury, then, and not till then, will the court interfere to relieve against the misappropriation of the trust fund." [3]

In *Matthews* v. *Skinker*,[4] it was held that an injunction would lie to restrain a sale under a power contained in a deed of trust given to secure a loan made by a national bank, on the ground that the bank had no authority to loan money upon real estate security; and that the deed of trust was therefore void. But this case was overruled by the Supreme Court of the United States, where it was held, that a loan of money by a national bank on real estate security is valid as between the parties; that the borrower is estopped to allege the want of power in the bank to make such a loan; and that the mortgage may be enforced between the parties.[5]

A sale under a power which was not void in its inception may be enjoined when subsequent circumstances have rendered its execution inequitable. But a court of equity will

[1] Burnet v. Denniston, 5 Johns. Ch. 35; Hyland v. Stafford, 10 Barb. 558.

[2] Powell v. Hopkins, 38 Md. 1; Walker v. Cockey, 38 Md. 75; Casady v. Bosler, 11 Iowa, 242.

[3] Tooke v. Newman, 75 Ill 215. But see Bidwell v. Whitney, 4 Minn. 76, where it was held that the amount of a penalty fixed by the mortgage could not be recovered from the mortgagee, after he had been permitted to sell the property and apply the proceeds to its payment.

[4] 62 Mo. 329.

[5] Union National Bank v. Matthews, 98 U. S. 621.

not interfere in such case, except upon strong reasons. Although payment of the entire debt would, undoubtedly, afford ground for an injunction, the fact that a part of the debt had been paid,[1] or that a greater amount is claimed than is really due,[2] is not, in general, a sufficient ground for enjoining a sale, unless it be in restraint of selling more than enough to pay the amount due, or, if the accounts are complicated and the balance due under the mortgage is uncertain, until the equities between the parties, which should affect the amount due, can be settled, and the balance due ascertained.[3]

An injunction will not be granted to stay a sale under a power contained in a mortgage, in order to enable the mortgagor to set off a balance which may be found in his favor upon counterclaims arising out of separate transactions which are in controversy between the parties.[4]

A want of notice of the sale is not a sufficient ground for enjoining it. The purchaser is bound to know what the requirements of the deed and of the statute are, and to see that they have been complied with; and if a sale be made without a sufficient compliance with the essential requisites of the power, it may be set aside, and the mortgagor, or others interested in the equity of redemption, admitted to redeem upon the same terms as if no sale had taken place.[5] The same is true of a sale in which the mortgagee undertakes to sell an interest of the mortgagor not conveyed by the mortgage. The sale, as to such interest, would be simply void, and the purchaser could claim no rights under it. The injury would not, therefore, be such as an injunction should be granted to restrain.[6]

[1] Powell v. Hopkins, 38 Md. 1.
[2] Armstrong v. Dominick, 7 Minn. 49.
[3] Kornegay v. Spicer, 76 N. C. 95.
[4] Frieze v. Chapin, 2 R. I. 429.
[5] Jones on Mortgages, § 1810.
[6] Armstrong v. Sanford, 7 Minn. 49. But see Hubbard v. Jasinsk 46 Ill. 160.

§ 510. **Who may Exercise the Power.**—We have already seen that a legal assignment of a mortgage passes the power of sale, when the power is in terms extended to assigns; but unless the mortgage so provides, an assignee cannot, in general, execute the power.[1] In order to confer the power upon an assignee, the mortgagee must convey the whole of his estate. The conveyance of a portion of the estate will not, in law, carry with it a corresponding portion of the power, because this is in its nature indivisible. In such case the mortgagee may still execute the power, so far as the title is concerned, but cannot defeat the conveyance which he has made. The case put by way of illustration is this: A mortgagee in possession leases a portion of the mortgaged premises for a year. At the end of six months he sells the whole of the premises under his power, and becomes himself the purchaser. The power is well executed, and vests the equity of redemption in the whole of the premises in the mortgagee, subject, however, to all the rights of the lessee.[2] An assignee, in order to be entitled to exercise the power himself, must also be the legal assignee of the debt secured by the estate, as well as the estate itself: for it takes both of them to constitute all the interest of the donee of the power.[3] One who has become the assignee of the debt without the mortgage, cannot execute the power, nor can any mere equitable assignee.[4] It is to be remembered, however, that in many of the States a transfer of the debt operates an assignment of the mort-

[1] Crafts v. Dougherty (Tex.), 6 S. W. Rep. 850; *Ante*, § 458.

[2] Wilson v. Troup, 2 Cow. 236. See Torrey v. Cook, 116 Mass. 165, and cases cited.

[3] Pickett v. Jones, 63 Mo. 69; Heath v. Hall, 60 Ill. 344; Dill v. Sutterfield, 34 Mo. 52. An assignment which is not effectual either at common law or by statute, as, for instance, one made by an informal indorsement without any transfer of the note, does not operate to pass the power of sale to the assignee, but leaves it still in the mortgagee. Hamilton v. Lubukee, 51 Ill. 415.

[4] *Ante*, §§ 458, 470; Cushman v. Stone, 69 Ill. 516. An equitable assignee can avail himself of his assignment only in proceedings in equity. Olds v. Cummings, 31 Ill. 188.

gage.[1] But if the debt be not evidenced by an instrument assignable at law, so as to vest the legal estate in the assignee, then the power of sale does not pass, and can only be exercised by the mortgagee.[2]

Whenever the entire interest of the mortgagee passes by the assignment, then the power can only be exercised by the assignee; and it matters not that the assignment, though absolute in form, is in fact a security for a debt.[3] An assignment in law is also as effectual to pass the power to the assignee, as an assignment in fact.[4]

In regard to the assignment of a deed of trust a different rule prevails. We have already noticed that a trust is a confidence which cannot be delegated, except as provided by the instrument by which it is created, and the authority must be express and beyond question.[5]

§ 511. **What Notice is required** to be given of a sale under a power in a mortgage, depends upon the agreement of the parties and the provisions of the statute relating thereto. No notice at all is necessary, unless made so by statute or by the power itself.[6] It is almost the universal practice, however, to specify in a power of sale, in what manner and upon what notice it is to be exercised; and in several of the States the substance of the notice and the manner of giving it are prescribed by statute. The requirements of the power and the statute are, in such case, conditions upon which the power depends, and must be strictly com-

[1] *Ante*, § 471. In Alabama and Wisconsin a power of sale contained in a mortgage follows the assignment of the debt by force of the statute. Ala. Code, 1876, § 2198; Wis. Rev. Stat. 1878, § 2156. And see Hamilton v. Lubukee, 51 Ill. 419; Strother v. Law, 54 Ill. 413.

[2] See *ante*, § 472; Mason v. Ainsworth, 58 Ill. 163; Hamilton v. Lubukee, 51 Ill. 415.

[3] Slee v. Manhattan Co., 1 Paige, 48. But an assignment of a mortgage on a separate paper "for collection" does not pass the legal title. Fortier v. Darst, 31 Ill. 212; Brown v. Delaney, 22 Minn. 349.

[4] *Ante*, § 458.

[5] *Ante*, § 458; Whittelsey v. Hughes, 39 Mo. 13; Pickett v. Jones, 63 Mo. 195.

[6] Davey v. Durrant, 1 De G. & J. 535.

plied with.[1] Where there are statute requirements, the statute must be strictly complied with, whatever may be the terms of the power.[2] But in the absence of any statutory regulation upon the subject, the character and requisites of the notice are proper subjects of contract between the parties, and their contract will be binding.[3] If that leaves any matter pertaining to the exercise of the power to the discretion of the mortgagee or trustee, a fair and honest exercise of his judgment is required.[4] A mortgagee must act in a business-like manner, with a view to obtain as large a price as he reasonably can with due diligence on his part, and in common fairness towards the mortgagor.[5] And if he has promised the mortgagor, or any one claiming under him, that he will notify him if he should wish to enforce his mortgage, a foreclosure without such notice is fraudulent, and the property continues subject to redemption in the hands of the promisee.[6] But such a promise would not bind an assignee who had no notice of it. Nor would it affect the rights of a *bona fide* purchaser at a sale made by the person who made such promise, without giving the promised notice, if the purchaser had acquired title by receiving a deed before any proceedings were commenced to set aside the sale.[7] An actual personal notice of the sale, to the mortgagor, is unnecessary in any case, unless provided for in the mortgage, or unless promised in some

[1] Sherwood v. Reade, 7 Hill, 431; Lee v. Mason, 10 Mich. 403; Doyle v. Howard, 16 Mich. 261; Low v. Purdy, 2 Lans. 422; Van Slyke v. Shelden, 9 Barb. 278; Cole v. Moffit, 20 Barb. 18; Cohoes Company v. Goss, 13 Barb. 137; King v. Duntz, 11 Barb. 191; St. John v. Bumpstead, 17 Barb. 100; Gibson v. Jones, 5 Leigh (Va.), 370; Ormsby v. Tarascon, 3 Litt. (Ky.) 404; Dana v. Farrington, 4 Minn. 433.

[2] Lawrence v. Farmers' Loan and Trust Co., 13 N. Y. 200, 642.

[3] Martin v. Paxson, 66 Mo. 260.

[4] Ingle v. Culbertson, 43 Iowa, 265; Alcott v. Bynum, 17 Wall. 44; Woonsocket Saving Inst. v. Amer. Worsted Co., 13 R. I. 255.

[5] Hoffman v. Anthony, 6 R. I. 282; Matthie v. Edwards, 2 Cal. 465.

[6] Hall v. Cushman, 14 N. H. 171; Green v. Cross, 45 N. H. 574; Clarkson v. Creely, 40 Mo. 114; Rutherford v. Williams, 42 Mo. 18. And see Drinan v. Nichols, 115 Mass. 351.

[7] See Randall v. Hazelton, 12 Allen, 412.

other way.[1] A compliance with the terms of the power is all that is required, and this is all that a purchaser can be expected to look to, unless he has knowledge of facts which would charge him with notice of the equities of others. And while the power, or the statute regulating it, must be strictly complied with, and the utmost fairness observed in its execution, such strictness and literal compliance as would destroy the power should not be exacted.[2]

§ 512. **The Requisites of the Notice,** as before stated, are usually prescribed with more or less particularity in the power, and in some of the States the whole subject is regulated by statute. It is usually provided that notice of the sale shall be published in some newspaper printed and circulated in the county or place where the property is situated. If no particular newspaper is designated, the mortgagee or trustee may exercise his discretion in the selection of a suitable medium for the required publication. And if in so doing he acts with integrity, and in the exercise of fair intelligence, the sale will be valid.[3] It is not requisite that the notice shall be published in the newspaper having the largest circulation, or any specific circulation, or in a newspaper devoted to the publication of intelligence of any particular class or order, so that it is a publication adapted to impart the notice of the impending sale to the defendant and to the public.[4] But, if any particular medium of publication is designated, the terms of the power must be strictly pursued, or the sale will be void. Where the deed provided that notice of sale should be given by advertisement inserted in newspapers printed in St. Louis and Frank-

[1] Princeton Loan and Trust Co. v. Munson, 60 Ill. 371; Dyer v. Shurtleff, 112 Mass. 165; Hurt v. Kelly, 43 Mo. 238.

[2] Walker v. Arnold, 71 Ill. 350.

[3] Alcott v. Bynum, 17 Wall. 44; Ingle v. Culbertson, 43 Iowa, 265.

[4] A paper devoted to the gathering up and dissemination of legal news, may be a newspaper, and in that sense the *St. Louis Legal Recorder* was a newspaper, and publication in it imparted notice of a sale under deed of trust. Kellogg v. Carrico, 47 Mo. 157; Benkendorf v. Vincenz, 52 Mo. 441. And see Hull v. King (Minn.), 37 N. W. Rep. 792.

lin counties, and notice was only published in Franklin county, the sale was declared void.[1] And it has been held that although the mortgagee in choosing a newspaper in which to advertise notice of a sale complies literally with the terms of the power, yet if the newspaper is a small and obscure one, published in a remote part of the county, and it is apparent that it was selected for this reason, and that by reason of such, the mortgagor's interests may have suffered, he will be permitted to redeem.[2]

The notice given should contain such facts as reasonably to apprise the public of the time, terms and place of sale, and of the property to be sold; but mere omissions and inaccuracies in these respects, not calculated to mislead, and working no prejudice, are not to be regarded.[3] The notice ordinarily contains the names of the mortgagor and mortgagee, and of the assignee of the mortgage, if any; the date of the mortgage and where recorded; a description of the premises mortgaged; a statement that default has been made in the payment; and the time, place and terms of the sale, and is usually signed by the mortgagee or trustee, or whoever is to execute the power. Under a statute requiring that the notice shall specify the name of the mortgagee, it was held to be sufficient that the notice was signed by him, and contained an accurate reference to the record.[4] But a notice which was not signed by any one, and gave neither the name of the mortgagor nor mortgagee, nor, correctly, a reference to the page of the volume of land records on which the mortgage was recorded, nor even the name of the auctioneer who was employed to sell the estate, was held to be fatally defective; such notice affording to persons who might desire to pur-

[1] Thornburg v. Jones, 36 Mo. 514. And see Bigler v. Waller, 14 Wall. 297. And see Bragdon v. Hatch, 77 Me. 433.

[2] Webber v. Curtiss, 104 Ill. 309; Briggs v. Briggs, 135 Mass. 306.

A notice stating that the property would be sold for cash, at the courthouse door in the town of Hillsboro, but omitting to name the county, and that the property would be sold to the highest bidder at public vendue, *held* sufficient. Powers v. Kneckhoff, 41 Mo. 425.

[3] Candee v. Burke, 1 Hun (N. Y.), 546; Fitzpatrick v. Fitzpatrick, 6 R. I. 64.

chase the estate no means of ascertaining the validity of the title offered to them.[1] And a notice of sale which omits to identify the holder of the mortgage, and is signed by no one, although it states the names of the mortgagor and mortgagee, and refers to the book and page of the record of the mortgage, is ineffectual.[2] But the notice, it seems, need not name the owners of the equity of redemption, or the subsequent mortgagees, or others who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued.[3]

The description of the premises must be sufficient to identify the property, and must not be calculated to mislead the mortgagor or purchasers in regard to the quantity of land to be sold. Where the description, though including the lot to be sold, contained double the area of the lot mortgaged, the sale was held void.[4] So, a notice which states nothing as to the quantity of the land, and gives no metes and bounds, and no information whether it is a village lot or farm, is insufficient.[5] But a notice, which contained the name of the mortgagor, the date and number of the mortgage, the number of the lot in which the premises were situate, the town and quantity of acres mortgaged, was held sufficient, although there was no description by metes and bounds.[6] If the description of the premises follows that in the mortgage, a change in the street number

[1] Hoffman v. Anthony, 6 R. I. 282.

[2] Roche v. Farnsworth, 106 Mass. 509.

[3] Learned v. Foster, 117 Mass. 365; Dyer v. Shurtleff, 112 Mass. 165.

[4] Fenner v. Tucker, 6 R. I. 551.

[5] Rathbone v. Clarke, 9 Abb. Pr. 66, note.

[6] Jackson v. Harris, 3 Cow. 241. An advertisement, giving notice of a mortgagee's sale under a power contained in the mortgage, is sufficient, although not signed by the mortgagee, and although the mortgaged premises to be sold are described no more particularly than as "situated in the northerly part of the city of Providence, being the lot of land No. 10 (ten) on the plat of the land of S. W., surveyed and platted by H. F. W., July 7, 1845," provided the plat be recorded. Fitzpatrick v. Fitzpatrick, 6 R. I. 64. But see Montague v. Dawes, 14 Allen, 369.

of the building since the mortgage was made does not invalidate the notice.[1]

A power of sale authorizing the mortgagee to advertise and sell at auction the mortgaged premises, including all equity of redemption of the mortgagor, does not authorize a sale of the equity of redemption separately; and if the notice of sale states only that the mortgagor's equity of redemption will be sold, it is insufficient, and a sale of the premises under such a notice is invalid.[2] A mortgagee cannot execute a power of sale by selling less than the whole title of the mortgagor and himself in the land mortgaged.[3] But an advertisement by a second mortgagee, offering for sale "all the right, title, interest and estate which, by virtue of the power contained in said mortgage and the assignments thereof I have the right to sell in and to" the mortgaged premises, is not defective, though the authority given by the power is "to sell and dispose of the granted premises" subject to a prior mortgage.[4]

It is sufficient if the notice of sale contains enough to show that there has been a default in the conditions of the mortgage, and that the mortgage will be foreclosed by sale, without stating for what default the sale is to be made.[5] But a mere notice of the sale of mortgaged premises, without declaring it to be for the purpose of foreclosure, or in execution of the power of sale contained in the mortgage, is, it seems, insufficient.[6] And where the advertisement of the sale states a false assertion, as that the premises are to be sold for default of three mortgages, when there are only two, the third being on other land, by which the public might be mislead, or purchasers deterred from bidding, the sale will be irregular and void.[7] But for an ex-

[1] Model Lodging House Association v. City of Boston, 114 Mass. 133.

[2] Fowle v. Merrill, 10 Allen, 350.

[3] Torry v. Cook, 116 Mass. 165.

[4] Model Lodging House Association v. City of Boston, 114 Mass. 133.

[5] King v. Robinson, 122 Mass. 122; Model Lodging House Association v. The City of Boston, 114 Mass. 133; Bush v. Sherman, 80 Ill. 160.

[6] Judd v. O'Brien, 21 N. Y. 186.

[7] Burnet v. Denniston, 5 Johns. Ch. 35. But if the erroneous state-

cessive claim in the amount due, to effect the sale, some actual injury or fraudulent purpose must be shown.[1] An inconsiderable excess in the statement of the amount due is not ground for setting aside the sale.[2] The notice must specify definitely the time and place of the sale, and any error in this respect, which would be calculated to mislead, would invalidate the sale.[3] Thus, a notice of a sale advertised to take place in one year, when the sale was intended to be made, and was actually made, in the succeeding year, was held to be fatally defective.[4] And the same may be true of a notice in which the day of the week and the day of the month fixed for the sale are not coincident.[5] But where the advertisement stated the day of the month correctly, but gave the wrong day of the week, and the mistake was corrected in the notice published the day before the sale, there being no evidence of any intention to mislead, a bill in equity to set aside the sale for irregularity was dismissed.[6] If a mistake occurs which renders the proceedings irregular and voidable, the mortgagee has a right to waive those proceedings and commence anew, either by advertisement or by equitable suit to foreclosure.[7] Thus where, after the publication of the notice for some two or three weeks, it was discovered that the day appointed for the sale fell on Sunday, and the original notice was discontinued, and a new notice inserted claiming a larger amount and fixing a later date for the sale, it was held that there

ment is inserted by mistake, and a correction published with the notice, before it can be presumed to influence persons desiring to bid, this will not vitiate the sale. Hubbell v. Sibley, 5 Lans. (N. Y.) 51. And see Jencks v. Alexander, 11 Paige, 619.

[1] Klock v. Cronkhite, 1 Hill, 107; Jencks v. Alexander, 11 Paige, 619; Hamilton v. Lubukee, 51 Ill. 415.

[2] Ramsey v. Merriam, 6 Minn. 168.

[3] Miller v. Hull, 4 Denio, 104.

[4] Fenner v. Tucker, 6 R. I. 551. A notice of sale appointing no hour of the day, is not such indefiniteness as to overthrow the sale. Menard v. Crowe, 20 Minn. 448.

[5] Calloway v. People's Bank of Bellefontaine, 54 Ga. 441, 450.

[6] Chandler v. Cook, 2 McArthur (D. C.), 176.

[7] Atwater v. Kinman, Harr. Ch. 243.

was nothing in the proceedings authorizing the mortgagor to avoid the sale.[1] And in New York, where a sale was advertised to take place on Sunday, and postponed to the next day, the postponement being advertised beforehand, the sale was held to be regular.[2] But a change in the time appointed for the sale, after notice has once been given, by which the mortgagor is misled to his prejudice, will avoid the sale, notwithstanding the notice was published for the requisite length of time after the change.[3]

If the mortgage provide that the sale shall be made at any specified place, a sale made at any other place would not be in pursuance of the power, and would be invalid. But if it merely provides that a sale shall take place in a certain town or city, the trustee or mortgagee may cause it to be made at any usual convenient place.[4] Where the terms of a deed of trust required the sale to be made "at the court-house door," a sale made at the door of a building temporarily used as a court-house, pending repairs on the court-house proper, was held to be a sufficient compliance with the terms of the deed.[5] It does not seem to be requisite that the notice shall state the terms of the sale, or that the terms will be stated at the time of sale.[6]

In respect to the length of time notice is to be published, it was held in New York, where the statute requires that notice shall be published for twelve weeks successively, at

[1] Banning v. Armstrong, 7 Minn. 47.

[2] Sayles v. Smith, 12 Wend. 57.

[3] Dana v. Farrington, 4 Minn. 433.

[4] Hornby v. Cramer, 12 How. Pr. 490. Notice that a sale was to take place "at the town of St. Joseph," *held*, sufficient notice of the place of sale under the circumstances. Beatie v. Butler, 21 Mo. 313; Golcher v. Brisban, 20 Minn. 453; *Id.* 464.

[5] Hambright v. Brockman, 59 Mo. 52; Gregory v. Clarke, 75 Ill. 485. But see Walle v. Arnold, 7 Ch. Leg. News, 28.

[6] Model Lodging House Association v. City of Boston, 111 Mass. 139. And the fact that at the sale a deposit is required, and that this prevents a person then present from bidding, does not invalidate the sale if the mortgagee acts in good faith, and the requiring a deposit is usual and reasonable. Pope v. Burrage, 115 Mass. 282. And see Powers v. Kueckhoff, 41 Mo. 425.

least once a week, that the publication may be made in less than eighty-four days, or twelve full weeks, provided there be a publication once in each week for twelve successive weeks.[1] And a requirement of publication "ten days before the sale" has been held to be fulfilled by publishing a notice of a sale to be had on the thirteenth day of the month, on the second day of that month, and each day thereafter, except Sunday, although there are only nine insertions of the notice. Sunday omissions do not invalidate the notice.[2] But where a deed of trust requires twenty days' previous notice of the time and place of sale, it is not sufficient to have it published but once. The obvious intent is, to have the publication continued up to the sale.[3] And in a late case where the power required twenty days' notice of such sale, it was held that the twenty days were to be continuous, and notice once a week for five weeks was not sufficient.[4] Where a sale was authorized after "first giving thirty days' public notice," it was held to be properly advertised by the publication of a notice once a week for five weeks, the first publication being more than thirty days before the sale, such being the customary mode of advertising like sales.[5]

[1] George v. Arthur, 2 Hun, 406; Howard v. Hatch, 29 Barb. 297. But see Bunce v. Reed, 16 Barb. 347. Where the power requires notice to be published "once each week for three successive weeks," the first publication need not be made three full weeks before the time appointed for the sale. Frothingham v. March, 1 Mass. 247; Dexter v. Shepherd, 117 Mass. 480. And see Bacon v. Kennedy, 56 Mich. 329; Siemers v. Schrader, 88 Mo. 20; First Nat. Bank v. Bell Mining Co. (Mont.), 19 Pac. Rep. 403. Publication on August 3, and in each week following, up to and including September 14, the day of sale, *held* sufficient. Worley v. Naylor, 6 Minn. 192.

[2] Cushman v. Stone, 69 Ill. 516; Kellogg v. Carrico, 47 Mo. 157; Johnson v. Dorsey, 7 Gill (Md.), 269; Leffler v. Armstrong, 4 Iowa, 482.

[3] Stine v. Wilkson, 10 Mo. 75. A notice published once in the *Evening Gazette*, and then transferred to the *Atlas*, is insufficient, although the *Atlas* was the weekly reprint of the *Evening Gazette*, a daily paper—it appearing that the *Atlas* was published for, and circulated in the country, while the *Gazette* was almost entirely confined in circulation to the city.

[4] Washington v. Bassett (R. I.), 10 Atl. Rep. 625.

[5] Leffler v. Armstrong, 4 Iowa, 482. "Three weeks' previous notice"

The advertisement need not be dated. The time of its first appearance by publication fixes the date.[1] Care must be taken that the publication does not appear before the default has occurred, nor after the sale has taken place, as any such notice would be ineffectual. Sometimes it is provided that the last notice shall be published a certain number of days before the sale, in which case a longer notice within a reasonable limit will not invalidate the sale.[2] But the sale must, in every case, be within such a reasonable time after the last publication, as not to thwart the purpose of the notice.[3] And, lastly, it may be said that the burden of showing that a notice of a sale under the power in a mortgage was defective, is on him objecting.[4]

§ 513. **Conduct of the Sale.**—All essential requisites of notice having been complied with, the sale must be made in exact pursuance thereof, unless postponed, upon due notice, to a future date. It is well settled that a mortgagee or trustee may, in the exercise of a reasonable discretion, adjourn the sale from time to time:[5] and under some circumstances it would be his duty to do so. He must act in good faith and with a view to obtain the best price possible;[6] but under ordinary circumstances he is under no obligation to wait for the market to improve, and the validity of a sale, otherwise fairly conducted, is not impaired by the fact that the property brought less than its value.[7] He cannot be required to speculate upon the property, and no obliga-

is met by publication once a week for three weeks, and does not require publication of the notice daily for three weeks previous to the sale. Johnson v. Dorsey, 7 Gill (Md.), 269.

[1] Ramsey v. Merriam, 6 Minn. 168.

[2] Tooke v. Newman, 75 Ill. 215; Taylor v. Reid, 103 Ill. 349.

[3] Atkinson v. Duffy, 16 Minn. 45, it need not be within the week following.

[4] Tartt v. Clayton, 109 Ill. 579.

[5] Richards v. Holmes, 18 How. 143; Dexter v. Shepard, 117 Mass. 480.

[6] Vail v. Jacobs, 62 Mo. 130, 133; Johnston v. Eason, 3 Ired. Eq. 336. The sale of land under a statutory foreclosure is void where there are no bidders present at the sale except the auctioneer, who bids in the property on behalf of the mortgagee. Campbell v. Swan, 48 Barb. 109.

[7] Laclede Bank v. Keeler, 109 Ill. 385; Hoodless v. Reid, 112 Ill. 105.

tion ought to be imposed upon him by the court, that the parties did not see fit to impose by their contract.[1] It is only in cases of special emergency, in which common fairness and good faith would require him to exercise his discretion and adjourn the sale, that a failure to do so would invalidate a sale otherwise regular.

In respect to the notice required to be given of the adjournment, the authorities are not all agreed. In a few of the States the requisites of the notice are fixed by statute.[2] In others it has been held that a new notice must be given of the adjournment for the same length of time required in the first instance.[3] But, in general, this is not required.[4] In the absence of any statute, it would seem that an omission to advertise a sale adjourned for any reasonable length of time would not avoid the sale, provided the adjournment be announced at the time and place appointed for the sale.[5] But if the adjournment is published, the publication of the notice must correspond with the announcement made at the time, or the sale will be void.[6]

A trustee under a deed of trust must not only use good faith, but such a decree of dilligence as to bring the property to sale under the best possible circumstances, and such as will promise the best results to all concerned. He must, therefore, exercise his best judgment in all matters intrusted to his discretion, such as the selection of a medium for the publication of notice, in determining the proper mode of offering the property for sale, whether in parcels or in lump, and also as to the postponement of the sale under any given state of circumstances, of which he alone is the

[1] Franklin v. Greene, 2 Allen, 519.

[2] Minn. Stat. 1873, Vol. 2, pp. 900, 907; Wis. Rev. Stat., 1878, pp. 889, 891; 3 Rev. Stat. N. Y., 1875, pp. 847, 850.

[3] Thornton v. Boyden, 31 Ill. 200; Griffin v. Marine Co. of Chicago, 52 Ill. 130.

[4] Dana v. Farrington, 4 Minn. 433; Bennett v. Brundage, 8 Minn. 432; Jackson v. Clark, 7 Johns. 217; Sales v. Smith, 12 Wend. 57; Westgate v. Handlin, 7 How. Pr. 371.

[5] Hosmer v. Sargent, 8 Allen, 97.

[6] Miller v. Hall, 4 Den. 104.

judge. It has accordingly been held that the office and duties of a trustee are matters of personal confidence, which cannot be delegated to a third person to be exercised in his absence, unless the power is expressly given in the instrument conferring the trust; and that the absence of the trustee at the sale will render the sale void.[1] But although the discretionary powers of a trustee cannot be delegated, any mere mechanical or ministerial duty, such, for example, as causing notices to be put up, proclaiming the sale at auction, and receiving bids, he may do by another.[2] A less degree of stringency in this respect appears to have been applied, in some States, to a mortgagee, where it is held that he may employ an auctioneer or attorney to make the sale, and that his personal presence at the time and place of the sale is not essential, if he subsequently ratifies the acts done, by making the deed necessary to convey the property.[3] The sale is generally required to be at public auction; but if the power contains no restriction as to the mode of sale, and there is no statutory provision on the subject, the mortgagee may sell at private sale, as well as by public auction.[4] Though Mr. Jones considers that a sale by auction would be the safer and better course.

If the premises consist of distinct farms, tracts or lots, the better plan is to sell them separately, unless they are so situated as to bring a better price if sold together. In some of the States it is provided by statute that all such sales shall be in parcels, and no more sold than is necessary

[1] Graham v. King, 50 Mo. 22; Bales v. Perry, 51 Mo. 449; Vail v. Jacobs, 62 Mo. 130; Landrum v. Union Bank, 63 Mo. 48.

[2] Powell v. Tuttle, 3 N. Y. 396; Hubbard v. Jarrell, 23 Md. 82. See Tovart v. Hopkins, 24 Ill. 323; Hoit v. Russell, 56 N. H. 559; Cranston v. Crane, 97 Mass. 459.

[3] Fogarty v. Sawyer, 23 Cal. 570; Munn v. Burges, 70 Ill. 604.

[4] Jones on Mortgages, § 1863. Where the statute provides that the sale under a power in a mortgage shall be at public auction, a private sale would be ineffectual, notwithstanding the power contained in the mortgage authorized the mortgagee, on default, to sell the premises at private sale to satisfy the debt. Lawrence v. The Farmers' Loan and Trust Co., 13 N. Y. 200. And see Griffin v. Marine Co., 52 Ill. 130.

to satisfy the amount due on the mortgage.[1] In other States the rule has been adopted by the courts of requiring all forced sales to be made in parcels, where, from the distinctness of the items of property, such a mode of sale is practicable.[2] But generally, even under a statute requiring a sale in parcels, the question becomes one calling for the exercise of a sound discretion by the mortgagee; and if the premises will sell to a better advantage together, that is the proper mode to pursue, even if they are readily divisible.[3]

In an early case, where there was no such statute, and the mortgage authorized the mortgagee upon default to sell the whole estate, it was held that there was no obligation upon him to sell in parcels in order to obtain a greater price.[4] But the better opinion would seem to be that he is bound to exercise a reasonable discretion and make the sale in that way in which it will realize the largest sum of money. No reason is perceived why any distinction should be made in this regard between a mortgagee and a trustee in a deed of trust. It has frequently been held that the latter is bound to render the sale as beneficial as possible to the debtor, and to this end he must sell the property as a whole when it will sell to the best advantage in this way,[5] or, if it is susceptible of division, and will bring more if sold in separate parcels, he must adopt this mode, otherwise the sale will be set aside.[6] The mere fact that the property is sold in gross, though capable of easy division, is not *per se* sufficient to invalidate a sale. It must appear that the interests of the debtor were sacrificed,[7] or that there has been some attendant fraud, unfair dealing or abuse of the confidence reposed in the trustee.[8]

[1] Mich. Comp. Laws, 1872, Vol. 2, p. 1923. § 7; Minn. Stat. 1873, Vol. 2, p. 900, § 107; New York Rev. Stat. 1875, Vol. 3, p. 848, § 6; Wis. Rev. Stat. 1877, p. 890, § 3530.

[2] Rowley v. Brown, 1 Binn. (Pa.) 61.

[3] Wells v. Wells, 47 Barb. 416.

[4] Adams v. Scott, 7 W. R. 213.

[5] Singleton v. Scott, 11 Iowa, 589; Carter v. Abshire, 48 Mo. 300.

[6] Chesley v. Chesley, 49 Mo. 540, and cases cited.

[7] Chesley v. Chesley, 54 Mo. 347.

[8] Benkendorf v. Vincenz, 52 Mo. 441; Kline v. Vogel, 11 Mo. App. 211.

The same prudence and good faith is required of a mortgagee or trustee in fixing the terms of sale, as in the mode of offering the property. He must not only adhere strictly to the terms of the power, but is bound to adopt proper means to obtain a reasonable price for the property.[1] And any unreasonable condition which would deter persons from attending or bidding will avoid the sale.[2] The acts or condition complained of must however be shown to have had that effect.[3] Objections to the sale address themselves to the sound discretion of the court, to be weighed with all the circumstances involving the duty of trustees and the interests of mortgagor and *cestui que trust*, and a just and reasonable construction is to be adopted for the protection of all parties in interest.[4]

§ 514. **Who may Purchase.**—A mortgagee is generally regarded as occupying a fiduciary relation to the mortgagor, and cannot himself become a purchaser at the sale, either directly or indirectly, unless authorized by statute, or the right is given him by the terms of the power.[5] By statute in several of the States, the mortgagee may fairly and in good faith become the purchaser of the mortgaged property.[6] He may, anywhere, secure this privilege to himself by the terms of the power, and become

[1] Jones on Mortgages, § 1864; Falkner v. The Equitable Reversionary Soc., 4 Drew. 357.

[2] Goldsmith v. Osborne, 1 Edw. (N. Y.) Ch. 560; Goode v. Comfort, 39 Mo. 413; Falkner v. The Equitable Reversionary Soc., 4 Drew. 357; Jones v. Moore, 42 Mo. 413.

[3] Goode v. Comfort, 39 Mo. 313; Jones v. Moore, 42 Mo. 413.

[4] Horsey v. Hough, 38 Md. 130.

[5] Ross v. Demoss, 45 Ill. 448; Hall v. Towne, 45 Ill. 493; Waite v. Dennison, 51 Ill. 319; Griffin v. Marine Co., 52 Ill. 130; Roberts v. Fleming, 53 Ill. 196; Watson v. Sherman, 84 Ill. 263; Rutherford v. Williams, 42 Mo. 18; Jenison v. Hapgood, 7 Pick. 1; Howard v. Ames, 3 Met. 308; Middlesex Bank v. Minot, 4 Metc. 325; Dobson v. Racey, 3 Sand. Ch. 60; Benham v. Rowe, 2 Cal. 387; Hyndman v. Hyndman, 19 Vt. 9; Kornegay v. Spicer, 76 N. C. 95; Whitehead v. Hellen, 76 N. C. 99; Lockett v. Hill, 1 Woods, 552; Gibson v. Barber (N. C.), 6 S. E. Rep. 766.

[6] Dak. C. Civ. Pro., § 605; Md. Rev. Code, 1878, art. 66, § 55; New York Civ. Code, § 2394; Minn. Gen. Stat. 1878, ch. 81, § 10; Wis. Rev. Stat. 1878, § 3531; Mich. Comp. Laws, 1882, § 8504.

the purchaser through the intervention of a third person.[1] But he will be held to the strictest good faith, and the utmost diligence for the protection of the rights of his principal.[2] If a mortgagee who is not authorized becomes the purchaser through a third person, the sale may be avoided by the mortgagor,[3] if application is made within a reasonable time;[4] and it is not necessary for him to show that there was any actual fraud or unfairness in the transaction.[5] But no one except the mortgagor has a right to complain of such a sale and purchase. It cannot be treated, in a suit at law, as absolutely void, unless actual fraud is shown.[6] And if the title acquired in this way has passed into the hands of a *bona fide* purchaser, for an adequate consideration, the sale cannot afterwards be impeached.[7]

The same reasons which prohibit a mortgagee or trustee from purchasing at his own sale, apply equally well to his solicitor or agent who conducts the sale. The latter occupies the same fiduciary relation, and is bound by the same obligations, as the former, and consequently can neither become a purchaser for himself or another.[8]

[1] Dexter v. Shepard, 117 Mass. 365. And see Hall v. Bliss, 118 Mass. 554.

[2] Montague v. Dawes, 14 Allen, 369.

[3] Thornton v. Irwin, 43 Mo. 153; Blockley v. Fowler, 21 Cal. 326; Parmenter v. Walker, 9 R. I. 225; Garland v. Watson, 74 Ala. 323.

[4] If the objection is not made within a reasonable time, the sale will not be disturbed. Patten v. Pearson, 60 Me. 223; Allen v. Ranson, 44 Mo. 263; Medsker v. Swaney, 45 Mo. 273; McLean v. Presley, 56 Ala. 211; Johnson v. Watson, 87 Ill. 535; Joyner v. Farmer, 78 N. C. 196; Boutwell v. Steiner, 84 Ala. 307; Ezzel v. Watson (Ala.), 3 South. Rep. 309; Dawkins v. Patterson, 87 N. C. 384; Thomas v. Jones (Ala.), 4 South. Rep. 270.

[5] Rutherford v. Williams, 42 Mo. 18; Thornton v. Irwin, 43 Mo. 153; Blockley v. Fowler, 21 Cal. 326. But see Richards v. Holmes, 18 How. 143; Howards v. Davis, 6 Tex. 174.

[6] Edmondson v. Welsh, 27 Ala. 578; Benham v. Rowe, 2 Cal. 387; Patten v. Pearson, 57 Me. 428; Mulvey v. Gibson, 87 Ill. 367; Burns v. Thayer, 115 Mass. 89; Joyner v. Farmer, 78 N. C. 196.

[7] Burns v. Thayer, 115 Mass. 89; Gibbons v. Hoag, 95 Ill. 45. And see Dexter v. Shepard, 117 Mass. 480.

[8] Dyer v. Shurtleff, 112 Mass. 165. (34)

While the policy of the law does not permit a trustee, either directly or indirectly, to become a purchaser at his own sale, after the sale has been made in good faith, the trust is discharged, and he has the same rights to purchase the trust property from his grantee as a stranger, if the transaction is in good faith. And the presumption is in favor of his innocence and fidelity to duty, until the contrary is shown.[1]

§ 515. **The Deed** should come from the holder of the legal title. Therefore, an assignee who is expressly authorized by the the terms of the power to advertise and make the sale, is the proper person, upon the sale being made, to execute the deed, he holding the legal title by conveyance from the mortgagee. A provision that the mortgagee shall execute the deed, will be construed to apply where he holds the legal title.[2] Under a statute empowering the sheriff to make the sale and conveyance on default, the officer who sells stands in the shoes of the mortgagee, and represents both parties. The effect of the statute is the same as if made part of the mortgage. The power of sale continues in force as a personal power, until completed by deed, in the person who acted when the property was struck off, passing in case of his death to his representatives, and not to any official successor. Thus it was held, where the sale was made by the sheriff, that he might, at the proper time, lawfully execute the deed, though his term of office had, in the meantime, expired.[3]

If the mortgagee is a married woman, and the power of sale authorizes her to make all necessary conveyances for vesting the premises in the purchaser, in fee-simple absolute, it may be executed by her sole deed reciting the power, and signed and sealed with her own name and seal, without her husband's consent.[4]

[1] Munn v. Burges, 70 Ill. 604; Watson v. Sherman, 84 Ill. 263.
[2] Heath v. Hall, 60 Ill. 344.
[3] Hoffman v. Harrington, 33 Mich. 392.
[4] Cranston v. Crane, 97 Mass. 459.

Where the power of sale authorizes the mortgagee, his personal representatives or assigns, to sell the premises, and, "as attorney" of the mortgagor, to execute a deed to the purchaser, a deed made by the mortgagee or his assignee, in his own name, would not pass the legal title.[1] On the other hand, where the power is given to be exercised by the donee, the conveyance should be executed in the name of the donee.[2] Where the power was "to make, execute and deliver to the purchaser or purchasers thereof all necessary conveyances for the purpose of vesting in such purchaser or purchasers the premises so sold in fee-simple absolute," it was held that this was not a mere power of attorney to execute a deed in the name of the mortgagor; though the deed might not, perhaps, have been invalid if it had been executed in that manner, but that it was a full power of sale and conveyance, which was properly executed by the deed of the mortgagee, reciting the power, and signed and sealed with her own name and proper seal.[3]

Where the mortgagee is described as administrator, the deed is properly executed under the power, in his own name, right and character, since he cannot hold land in the character of administrator.[4]

If by reason of any informality the deed is insufficient to convey a good legal title, it will yet pass an equity to the grantee.[5] A purchaser who has paid the purchase-money is subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him, and he may proceed anew to foreclose.[6]

We have seen that a mortgagee, when authorized by statute, or by the terms of the power, may himself become the

[1] Spear v. Hadduck, 31 Ill. 439.

[2] Cranston v. Crane, 97 Mass. 459.

[3] *Ibid.*

[4] Wilkerson v. Allen, 67 Mo. 510.

[5] Mulvey v. Gibbons, 87 Ill. 367.

[6] Jones v. Mack, 53 Mo. 147. Such title is a good equitable defense to suit in ejectment by one holding under the mortgage. Russell v. Whitely, 59 Mo. 196.

purchaser at the mortgage sale.[1] Under the statute in New York, no deed is necessary in such case. The affidavits of the publication, and posting, and service of notice of the sale, take the place of a deed, and operate as a statutory conveyance.[2] In the absence of such a statute, where the mortgagee becomes the purchaser, by virtue of the authority given him by the power, it is the usual practice for him to convey the property first to a third party, who conveys it back to the mortgagee. But in a recent case in Massachusetts, it was held that the mortgagee might convey directly to himself, and that such a conveyance was valid.[3]

The deed should recite the power by virtue of which it is made, in order to avoid any misconstruction of it; though it is not absolutely essential that it should even refer to the power, where it is manifestly the intention of the party to execute it. If such intention is not manifest, a simple deed by a mortgagee will be construed to convey only his mortgage interest subject to redemption.[4] We have already seen that the recitals in a mortgagee's or trustee's deed are not evidence of the facts recited, unless made so by statute, or by the terms of the power under which it is executed.[5]

Statute provisions, requiring a copy of the notice of sale, and an affidavit of publication to be filed and recorded in the office of the recorder of deeds of the county in which the land is situated, are intended to secure the preservation of the evidence that the conditions of the power have been complied with, and not to add a new condition to the contract of the parties. The title passes by the sale and deed, and immediately vests in the purchaser, and is not liable to be divested by a failure to make or record the affidavit.[6] If there be no affidavit, the publication of the notice and circumstances of the sale may be proved by common-law evidence.[7]

[1] *Ante*, p. 134.

[2] Layman v. Whiting, 20 Barb. 559.

[3] Hall v. Bliss, 118 Mass. 554.

[4] Pease v. Pilot Knob Iron Co., 49 Mo. 124.

[5] *Ante*, § 73.

[6] Field v. Gooding, 106 Mass. 310; Burns v. Thayer, 115 Mass. 89.

[7] Arnot v. McClure, 1 Den. (N. Y.) 11.

TITLE IV.—Wills.

Chapter XIII. The General Requisites of a Valid Devise.
XIV. Of the Revocation and Republication of Wills.
XV. Of the Probate of Wills and of their Registration.
XVI. Of the Construction of Wills.

CHAPTER XIII.—The General Requisites of a Valid Devise.

Article I. The Nature of a Will.
II. The Parties to a Devise.
III. The Proper Subject of a Devise.
IV. The Execution of Wills.

ARTICLE I.

THE NATURE OF A WILL.

SECTION.
518. Preliminary remarks.
519. Definitions.
520. The distinction between a will and a deed.

§ 518. **Preliminary Remarks.**—It is not our purpose to enter into an extended discussion of the law of wills: but, as devises of real estate are practically conveyances under which property is taken by purchase, the general requisites of these instruments will be briefly noticed. In our ex-

amination of the subject it will be impossible to follow our usual plan of considering each clause or part in the order in which they ordinarily occur in the instrument: for, although all other instruments to which attention has been called, have some parts in common with the class to which they belong, wills, as observed by Mr. Dean,[1] can in no respect be said to be matters of common form, since the law prescribes no particular form in which a will shall be framed.

§ 519. **Definitions.**—A will is the disposition of one's property to take effect after death,[2] usually termed "last will and testament." As an expression of the final disposition of one's property the word *will* is derived from the English common law: while the term *testament* is exclusively used in the Roman civil law and by continental writers upon the subject. The word *will* signifies literally volition, choice, desire of the mind: the word *testament*, the testimony of a party, or an expression of his mind or will. In practical application the terms are synonymous.[3]

"The term devise," says Mr. Redfield, "is applied more exclusively to a testamentary disposition of lands, and in the English courts has been regarded more in the nature of a conveyance, or appointment of particular lands to a particular devisee, than in that of a testament."[4]

Wills are distinguished in regard to the form in which they are made, as written and *nuncupative* or unwritten.

The statute of 1 Vict., ch. 26, rendered nuncupative wills invalid, except as to soldiers in actual military service, and mariners or seamen, being at sea, who might thus dispose of personal estate. In this country the statutes of all the States have either placed such wills under special restrictions, reducing them within the same narrow limits as the English statutes, or limited them to a small amount of estate. What we shall have to say upon this subject will, of course,

[1] Dean's Prin. Conv. 120.

[2] Swinburn, Wills, pt. 1, sec. 2; Godolphin, pt. 1, ch. 1, sec. 2; 1 Redfield on Wills, 5.

[3] Bouvier's Law Dict., *Wills*.

[4] 1 Redfield on Wills, p. 6.

be confined to devises of real estate, which, under the Statute of Frauds, are required to be in writing.

A holographic will is one written wholly by the testator himself. In some of the States, as we shall see, a will of this character may be established by proof of the handwriting of the testator, notwithstanding there be no attesting witnesses.[1]

A codicil is an instrument or writing by which additions, subtractions, alterations or explanations are made in or to a will, and it constitutes a part of the will. A codicil must be executed with precisely the same formalities as a will. There may be several codicils to one will, but the will and all codicils relating thereto must, in general, be read as one entire instrument.[2]

§ 520. **The Distinction between a Will and a Deed.**—In its nature a will differs from a deed; yet an instrument may be so framed and executed as to operate as a deed in one part and as a will in another.[3] And a paper having the formalities of a deed may be a will, or it may admit of construction either as a deed or as a will, and in such case, that interpretation should be given to it which will effect the will of the maker, and best preserve the rights of other contracting parties.[4] The intention of the maker, not as to the form and character of the instrument, but as to the nature of the estate conveyed, is the criterion by which to determine whether the paper is a deed or a will; and if the intention gathered from the whole paper is that the estate is not to pass, or the instrument take effect until his death, it is a will and not a deed.[5] Accordingly, a writing in form of a deed, which conveys all the property that the maker "may die possessed of," is a will, and is only admissible in

[1] *Infra*, § 543.

[2] 1 Redfield on Wills, 4th ed., 287.

[3] Robinson v. Schly, 6 Ga. 526; Taylor v. Kelley, 31 Ala. 59.

[4] Williams on Ex., 9, n; Doe v. Cross, 8 Ad. & E. (N. S.) 714.

[5] Brewer v. Baxter, 5 Amer. R. 30; *s. c.*, 41 Ga. 212; Hester v. Young, 2 Kelley, 31; Lyles v. Lyles, 2 Nott. & M. (S. C.) 531; Dawson v. Dawson, Rice (S. C.) Ch. 243. See interesting discussion of this question in Driesbach v. Serfass, 17 Atl. Rep. 513.

evidence after due probate.[1] So a writing by two, purporting to be a will, whereby, in consideration of mutual friendship, they mutually promise that in the event of the death of either, the survivor, after paying expenses, etc., should have the estate of the deceased, was held to be a will revocable by either, and was rendered inoperative by a subsequent separate will of either.[2] But it is regarded as settled that mutual wills, duly executed, become irrevocable, in equity, after the death of either party.[3]

ARTICLE II.

THE PARTIES TO A DEVISE.

SECTION.

523. There must be competent parties to every valid devise.
524. The age at which persons may devise their estates.
525. Coverture as a testamentary disability.
526. Persons of non-sane mind.
527. Deaf, dumb and blind persons.
528. Persons under disability from crime.
529. As to the devisee.

§ 523. **There must be Competent Parties to every Valid Devise.**—Like any other instrument of conveyance or contract, a will must have parties thereto, capable in law of executing the same, and of taking under its provisions. The general rule is that every person of sound mind, who has arrived at the age of discretion, is capable of making a will; but the same exceptions exist for want of capacity to make a will, as in case of any other contract.

[1] Brewer v. Baxter, *supra*; Watkins v. Dean, 10 Yerg. (Tenn.) 321. Schumaker v. Schmidt, 4 Amer. R. 135; *s. c.*, 44 Ala. 454. See Gould v. Mansfield, 4 Amer. R. 573; *s. c.*, 103 Mass. 408. And see Evans v. Smith, 28 Ga. 98.

[2] 1 Redfield on Wills, 4th ed., 183.

§ 524. **The Age at which Persons are allowed to Dispose of their Property by Will** is fixed by statute in all of the States. It ranges from twenty-one in both male and female in some States, down to fourteen in others; and in some instances a difference is made between the ages at which persons may make a will of real estate, and that at which they may make a will of personal property; and again a difference is made in some States between males and females as to their testamentary age. Below we give a summary of the statute provisions in the several States in regard to the age at which persons may make a will of real estate.[1] When an infant possessing sufficient discretion

[1] Alabama, male and female twenty-one years, Code 1876, § 2274; Arizona, "every person of full age," Comp. Laws, 1877, § 1489; Arkansas, male, twenty-one years, female eighteen years, Stat. 1884, §§ 3464, 6490; California, eighteen years, Hitt. Code, 1876, § 6270; Colorado, twenty-one years if male, and eighteen years if unmarried female, Gen. Stat. 1883, § 3481; Connecticut, eighteen years, Gen. Stat. 1875, ch. 11, § 1; Dakota, every person of full age, Dakota Civ. Code, 1883, § 683; Delaware, twenty-one years, Laws 1874, ch. 84, § 2; Florida, twenty-one years, Dig. 1881, ch. 200, § 1; Georgia, fourteen years, Code, 1882, §§ 2405, 2406; Illinois, twenty-one, if male, and eighteen, if female, Rev. Stat. 1880, ch. 148, § 1; Indiana, "all persons except infants," Stat. 1881, § 2556; Iowa, if unmarried male, twenty-one, female eighteen. All minors attaining majority by marriage may make a will, Rev. Code 1880, p. 607, § 2322; Kansas, male, twenty-one, female, eighteen, Dassler's Stat. 1879, ch. 117, § 1; Kentucky, twenty-one, minors may make will under certain circumstances, Gen. Stat. 1879, ch. 113, §§ 2, 3; Louisiana, sixteen years, Civ. Code, arts. 1463, 1464; Maine, twenty-one years, Rev. Stat. 1883, ch. 74, § 1; Maryland, male twenty-one, female eighteen, Rev. Code, 1878, art. 49, § 3; Massachusetts, twenty-one years, Gen. Stat. 1882, ch. 127, §1; Minnesota, twenty-one years, if male, eighteen, if female, Stat. 1878, ch. 47, § 1; Mississippi, twenty-one years, Rev. Code, 1880, § 1262; Missouri, twenty-one if male, eighteen if female, Rev. Stat. 1879, §§ 3960, 3961; Michigan, "every person of full age," Ann. Stat. 1882, § 5758; Montana, male twenty-one, female eighteen, Rev. Stat. 1879, § 432; Nebraska, male twenty-one, female eighteen, and also married female between ages of sixteen and eighteen years, Comp. Stat. 1881, ch. 1, art 23, § 123; Nevada, eighteen years, Comp. Laws 1872, § 812; New Hampshire, twenty-one years, Gen. Laws, 1878, ch. 193, § 1; New Jersey, twenty-one years, Rev. 1877, p. 1244, § 3; New Mexico, fourteen if male, twelve if female, except prodigal persons and deaf and dumb not able to write, Gen. Laws, 1881, ch. 3, § 2; New York, twenty-one years, Rev. Stat. part 2, ch. 6, tit. 1, § 1; North Caro-

has attained the age prescribed by statute, he or she may make a will without, or against the consent of either tutor, father, guardian or husband.[1] But, in general, no person who has not attained the age prescribed by statute, whether male or female, married or unmarried, can make a valid will for any purpose.[2]

§ 525. **Coverture as a Testamentary Disability.**—By the laws of England coverture has always been, to a greater or less extent, a testamentary disability; but in this country, the tendency is very strong toward a removal of all property disabilities attaching to married women.[3] By statute, in many of the States, and by implication in the absence of it in others, a married woman may now devise and bequeath the same as if sole.[4] In some of the States the

lina, twenty-one years, Code 1883, § 2137; Ohio, male twenty-one, female eighteen, Rev. Stat. 1880, § 5914; Oregon, twenty-one years, Gen. Laws 1872, ch. 64 § 1; Pennsylvania, twenty-one years, Brightly's Dig., vol. 2, p. 1474, §§ 1, 3; Rhode Island, twenty-one years, Pub. Stat. 1882, ch. 182, § 1; South Carolina, twenty-one years, Gen. Stat. 1882, § 1853; Texas, twenty-one years, or any one who has been married, Rev. Stat. 1879, art. 4857; Utah, eighteen years, Comp. Laws, 1876, p. 270, § 1; Vermont, male twenty-one, female eighteen, Rev. Laws 1880, §§ 2039, 2421; Virginia, twenty-one years, Code 1873, ch. 118, § 3; West Virginia, twenty-one years, Rev. Stat. 1882, ch. 84, § 2; Wisconsin, every person over the age of twenty-one years and also women of eighteen and upward, Rev. Stat. 1878, ch. 103, § 2277.

[1] Noble v. Enos, 19 Ind. 72.

[2] In Iowa and Texas, it seems, all married persons are to be regarded as of full age for the purpose of making a will. Rev. Code, Iowa, 1880, p. 607, § 2322; Rev. Stat. Texas, 1878, art. 4857.

[3] See note to Cutter v. Butler, 57 Amer. Dec. 340, for extensive review of the law on this subject.

[4] Arkansas Const., 1874, art. 9, § 7; Dig. 1874, § 5762; Connecticut, Gen. Stat. 1875, ch. 11, § 16; Dakota, Civ. Code, § 684; Florida, Dig. 1881, ch. 150 § 1; Illinois, Rev. Stat. 1883, ch. 68, § 9; Indiana, Rev. Stat. 1881, §§ 2557, 2558; Iowa, Rev. Code, 1880, p. 525, § 1935; Louisiana Civ. Code, art. 1466; Maine, Rev. Stat. 1883, ch. 61, § 1; Maryland, as to all property acquired since 1860, Rev. Code, 1878, art 51, § 20; Michigan, Laws 1882, § 6295; Minnesota, Stat. 1878, ch. 47, § 1; Mississippi, Rev. Code, 1880, §§ 1167, 1262; Montana, except as to will made to a church or eleemosynary institution which requires written consent of husand, Rev. Stat. 1879, § 433; Nevada, Comp. Laws, 1873, § 812; Texas, Rev. Stat. 1879, art. 4857; Utah, Comp. Laws, 1876, p. 271, § 5; Vermont,

statute provision is, that she may thus dispose of her separate property,[1] while in others she can only devise subject to the husband's right by the curtesy.[2] In Colorado the wife may will one-half of her real and personal estate, but no more without her husband's consent; and the same restriction is placed upon the power of the husband to dispose of his estate by will.[3] In Delaware, Georgia and Nebraska a married woman can only make a will under certain restrictions, and by consent of her husband;[4] except that, as at common law, she may make a will in exercise of a power without the concurrence of her husband.

§ 526. **Persons of Non-sane Mind.**—The law requires in all cases that the testator shall be a person of sound mind and free from duress or undue influence. Upon the simple question of mental capacity to make a will, discarding all technical distinctions, it may be stated as a result of the decisions that, if the testator has the mental ability to recollect his property and the persons among whom it might naturally be bestowed, with sufficient clearness to make an intelligent disposition of it, and is not laboring under any delusion of which his act is the direct offspring, he may ex-

Rev. Laws 1889, ch. 104, § 2039; West Virginia, Rev. Stat. 1879, ch. 201, § 2; Wisconsin, Rev. Stat. 1878, § 2277; Wyoming, Comp. Laws, ch. 82, § 4.

[1] Alabama, Code, 1876, § 2713; Arizona, Comp. Laws, 1877, ch. 28, § 1; California, Civ. Code, § 1270; Kentucky, Gen. Stat., ch. 113, § 4; Nevada, Comp. Laws, 1873, § 812; Pennsylvania, Brightly's Dig., p. 1477, §§ 2, 3; South Carolina, Gen. Stat., 1882, § 2036; Virginia, Code, 1873, ch. 118, § 3; Washington Ter., Stat. 1879, p. 78.

[2] Kansas, Dassler's Comp. Laws 1879, p. 539, § 3137; Massachusetts, Gen. Stat., ch. 108, §§ 9, 10; Missouri, Rev. Stat. 1879, §§ 3960, 3961; New Hampshire, Gen. Stat., ch. 164, § 12; New Jersey, Rev., 1877, p. 638, § 9; North Carolina, Battle's Rev., ch. 69, § 31; Ohio, Rev. Stat. 1880, §§ 3108, 5914; Allen v. Little, 5 Ohio, 65; Oregon, Gen. Laws, 1872, ch. 64, § 3; Rhode Island, Gen. Stat. 1872, ch. 152, § 13; Tennessee, Code, 1884, § 3350.

[3] Gen. Stat., 1883, § 2269.

[4] Delaware, Amended Laws, 1874, ch. 76, § 3; Georgia, Code, 1882, § 2410; Nebraska, Gen. Stat., 1873, p. 299, § 123.

ecute a valid will.[1] And a person may possess sufficient testamentary capacity, though he be of unsound mind in a measure or his memory be impaired.[2]

It is a universal rule, applicable alike to contracts and to wills, that they must have the full and free consent of the parties making them; at least, they must not be procured by fraud, force or violence, or by imprisonment or illegal restraint, either actual or constructive, nor by over-importunity or undue influence, such as takes from the testator free agency.[3]

§ 527. **Deaf, Dumb and Blind Persons.**—Blindness is so far an incapacity, that it requires express and satisfactory proof that the testator understood the contents of the will, in addition to what is required in other cases.[4] Deaf and dumb persons labor under a similar inconvenience, especially in communicating with witnesses, unless they have been educated so as to be able to write; and this difficulty is very greatly increased when the defects of sight and hearing are combined in the same person. "But," says Mr. Redfield, "there can be no question whatever, at the present day, that such a person, having received instruction so as to be able to comprehend the nature of the transaction, will be entirely competent to execute a will."[5]

[1] For the very numerous authorities on the subject, see 1 Redfield on Wills, 4th ed., 30, 163. And see *ante*, §§ 28, 29; Edge v. Edge, 38 N. J. Eq. 211; Ballantine v. Proudfoot, 62 Wis. 216. One is competent to make a will if he knows what he is doing, his obligations to kindred, to friends, and to whom he is giving his property. Delaney v. Salina, 34 Kan. 532.

[2] Brice v. Hall (Ill.), 12 N. E. Rep. 236. And see Kramer v. Weinert (Ala.), 1 South Rep. 26.

Rollwagen v. Rollwagen, 63 N. Y. 504; Laughlin v. McDevitt, 63 N. Y. 213; Birch v. Birch, 64 N. Y. 141; Thompson v. Hawks, 14 Fed. Rep. 902; Schofield v. Walker, 58 Mich. 96. If a testator is legally competent to make a will, and acts freely, his will cannot be impeached because unreasonable, imprudent, or unaccountable. Nicholas v. Kershner, 20 W. Va. 251.

[4] 1 Jarman on Wills, 49. See Roy v. Hill, 3 Strobh. (S. C.) 297; Wilson v. Mitchell, 101 Pa. St. 495.

[5] 1 Redf. on Wills, 4th ed., 55. And see Martin v. Mitchell, 28 Ga. 382; Heiss' Appeal, 13 Pa. St. 73; Harris v. Vanderveer, 21 N. J. Eq. 561.

§ 528. **On Account of Crime.**—At common law, persons convicted of treason or felony forfeited their goods to the crown, and were, therefore, incapable of making a will.[1] But in this country, as stated in a former chapter, forfeitures of estate and corruption of blood, except for treason, are generally abolished. But persons sentenced to the penitentiary for a term less than life are suspended from all civil rights during such imprisonment, and if the sentence be for life, they are deemed to be civilly dead, and as to all civil rights are as dead, and, of course, cannot make a valid will.[2]

§ 529. **As to a Devisee.**—All persons who are at the time a will is made, capable of acquiring lands by purchase, may take title under the provisions of a will. The capacity of a purchaser has been discussed in a former chapter,[3] and need not be adverted here, except to note the fact that in some of the States special statutes have been enacted in reference to devises to churches and eleemosynary corporations, and also in reference to posthumous children, to which reference must be had in such cases.

Another disqualification, and one which applies especially to devisees, is that created by the policy of law which prohibits a devisee or legatee from being made an attesting witness to the will. This subject is also regulated by statute in most, if not in all States. In some of the States it is provided that such a devise shall be absolutely void as to such witness and all persons claiming under him.[4] In other States it is enacted that the devise shall be void as to such witness, unless there are other witnesses to the number required by the statute.[5] In several of the States it is

[1] 2 Bl. Com. 499.

[2] Presbury v. Hull, 34 Mo. 29; Graham v. Adams, 2 Johns. Cas. 408.

[3] *Ante*, § 33.

[4] Georgia, Code 1882, § 2417; New Jersey, Rev. 1877, p. 1244, § 4; North Carolina, Code 1883, § 2147; Rhode Island, Pub. Stat. 1882, ch. 182, § 15; South Carolina, Gen. Stat. 1882, § 1857.

[5] Arkansas, Mansf. Dig. 1884, § 6535; California, Civil Code, 1876, § 6282; Connecticut, Rev. 1875, p. 369, § 3; Colorado, Gen. Stat. 1883, § 3485; Dakota, Civil Code, 1877, § 717; Illinois, Stat. 1883, ch. 148, § 8;

provided that if any such witness would have been entitled to any share of the estate in case the will was not established, then so much of the share as would have descended to him, as will not exceed the devise made to him in the will, shall be saved to him.[1] In Connecticut, New Jersey and Vermont, if the witness be an heir-at-law of the testator, the devise is not void, even though it may exceed the amount that he would otherwise have received.[2]

ARTICLE III.

THE PROPER SUBJECT OF A DEVISE.

SECTION.

531. Proper subject-matter essential to every devise.
532. What law governs.
533. What estate or interest in land will pass by devise.
534. As to after-acquired property.
535. Cumulative devises.
536. The equitable conversion of real estate into money.

§ 531. **Proper Subject-matter Essential to Every Devise.**—Another essential requisite to a will is, that there must be proper subject-matter upon which it may operate. The proper subject-matter to a devise is real estate, and anything which does not come under that head cannot, of

Iowa, Code 1880, § 2327; Kansas, Gen. Stat. 1879, ch. 117, § 11; Kentucky, Gen. Stat. 1881, ch. 113, § 13; Massachusetts, Gen. Stat. 1882, ch. 127, § 3; Michigan, Stat. 1882, § 5791; Minnesota, Stat. 1878, ch. 47, § 7; Missouri, Rev. Stat. 1879, vol. 1, § 3995; Nebraska, Comp. Stat. 1881, pt. 1, ch. 23, § 130; New Hampshire, Gen. Laws, 1878, ch. 193, § 8; Vermont, Rev. Laws 1880, § 2046; Virginia, Code 1873, ch. 118, § 19; Wisconsin, Stat. 1878, p. 650, § 2285; Indiana, Rev. Stat. 1881, § 2586; New York, Rev. Stat. pt. 2, ch. 6 art. 1, § 50; Ohio, Rev. Stat. 1880, § 5925.

[1] Stimson's Amer. Stat. § 2651.

[2] Connecticut, Rev. 1875, p. 369, § 3; Vermont, Rev. Laws, 1880, § 2046; New Jersey, Rev. 1877, p. 1244, § 5.

course, be devised. Thus, chattels real, or terms of years, cannot, in general, be devised, though, like other personal property, they can be bequeathed, and so disposed of by will.

§ 532. **What Law Governs.**—Title to real estate can be acquired, passed and lost only in accordance with the laws of the country or State where it is situated; and the validity of every disposition of real property, whether testamentary or *inter vivos*, must depend upon those laws.[1] In some of the States, however, it is provided by statute that a will, executed in accordance with the laws of the State where the executor dwells, may be admitted to probate in the State where the land is situated.[2]

§ 533. **What Estate or Interest in Land will pass by a Devise.**—In general, whatever interest a testator has in real estate, whether a present interest or a future contingent interest in the nature of a contingent remainder or executory devise, is transmissible by deed or will.[3] Indeed, it seems that all contingent estates, whether of real or personal property, and all springing and executory uses and possibilities coupled with an interest, when the person who is to take is known and ascertained, are assignable, descendable, devisable and transmissible.[4]

In an early case in Massachusetts it was held that a testator could not devise lands of which he was disseized, to any one except the disseizor, and that to him the devise would operate as a release.[5] But the better opinion appears to be that it is no objection to the right to devise property,

[1] Eyre v. Storer, 37 N. H. 114; Potter v. Titcomb, 22 Me. 300; Norris v. Harris, 15 Cal. 226; White v. Howard, 52 Barb. 294; Appleget v. Smith, 31 Mo. 166; Kerr v. Moon, 9 Wheat. 566; Lapham v. Olney, 5 R. I. 413; Montgomery v. Milliken, 43 Amer. Dec. 518, with note; Burlington University v. Barnett, 92 *Id.* 376.

[2] Story, Contl. Laws, § 474.

[3] Thompson v. Hoop, 6 Ohio St. 480.

[4] Bunst v. Dawes, 4 Strobh. (S. C.) Eq. 37; Pond v. Bergh, 10 Paige, 149; Thompson v. Hoop, 6 Ohio St. 480.

[5] Poor v. Robinson, 10 Mass. 134.

that the testator has been disseized.[1] Statutes against champerty and maintenance do not apply to devise.[2]

§ 534. **As to After-acquired Property.**—The general principle of the common law is that a will can operate only upon land in which the testator had an interest at the time of the execution of his will, and will not transfer land in which he had no interest at that time, although he may own it at the time of his death; unless the will has been republished.[3] But, by the aid of statutes in several of the States, land acquired after the execution of the will passes by it without republication, if there be words in the will sufficient to cover it, and such appears to be the intention of the testator.[4]

§ 535. **Cumulative Devises.**—Where a specific thing is given twice to the same person, whether in the same will, or in the will and again in a codicil, or the like quantity is given to him twice by the same instrument, he can claim the benefit only of one legacy: but where the devise or bequest is of unequal quantities or of distinct things, the one is not merged in the other, but the gifts are cumulative and the devisee or legatee will take both.[5]

It has been said that a will, which devises or disposes of property according to the directions of the law simply is void.[6] Therefore a devise will not be treated as given for that to which the devisee or legatee is entitled by law, or in satisfaction of dower, unless it be so expressed in the will.[7] The right of dower is a legal right which the wife cannot

[1] Redfield on Wills, 4th ed., 392, and cases cited.

[2] Varick v. Jackson, 2 Wend. 166.

[3] Luce v. Dimock, 1 Root (Conn.), 82; Girard v. Mayor, 4 Rawle (Pa.), 323; Jackson v. Holloway, 7 Johns. (N. Y.) 394; Jackson v. Potter, 9 *Id.* 312; Grimke v. Grimke, 1 Desaus. (S. C.) 366; Parker v. Cole, 2 J. J. Marsh (Ky.) 503.

[4] See Stimson's Amer. Stat., § 2634. And see Morey v. Sohier, 63 N. H. 507; Briggs v. Briggs, 69 Iowa, 617.

[5] Williams on Ex. 1159.

[6] Lord v. Bourne, 63 Me. 368.

[7] Parsons v. Winslow, 6 Mass. 178; Whitney v. Whitney, 14 Mass. 90; Ellis v. Page, 7 Cush. 161; Sears v. Russell, 8 Gray, 93.

be deprived of by a provision in the will in her favor, unless the testator has manifested his intention to deprive her of dower, either by express words or necessary implication.[1] But if the legacy or devise is given in express terms in lieu of dower, the widow is doubtless put to her election, for she cannot take both. In Missouri, a devise of real estate to the widow is to be treated as given in lieu of dower, unless the testator by his will otherwise declares.[2]

§ 536. **The Equitable Conversion of Real Estate into Money.**—A testator cannot alter the legal character of real property by directing that it shall be considered as part of his personal property, but he may direct an absolute conversion of real estate into money for all purposes or for distribution, and in that case the land is regarded as money upon the principle that what is agreed to be done, or directed to be done, is in equity considered as actually done.[3] Such a direction in the will operates as a conversion of the realty into personalty immediately upon the death of the testator, and the land becomes money, for all purposes of administration.[4] On the other hand, money ordered to be invested in land is, in equity, considered as land.[5]

[1] Fuller v. Yates, 8 Paige, 328; Hawley v. James, 5 Paige, 318; Wood v. Wood, *Id.* 596; Sanford v. Jackson, 10 Paige, 266; Adsit v. Adsit, 2 Johns. Ch. 451; Lefevre v. Lefevre, 59 N. Y. 434. The statute of Iowa, which authorizes a person of full age and of sound mind to dispose of his estate by will, expressly excepts what is sufficient to pay his debts, or what is allowed as a homestead, or given by law to his wife and family. Code 1880, § 2322. This exception would follow as a matter of course in all cases, since a man cannot dispose of that over which he has no control, except by consent of the parties in interest.

[2] Brant's Will, 40 Mo. 266.

[3] Williams on Ex. 582.

[4] Fisher v. Banta, 66 N. Y. 468; Bogett v. Hertell, 4 Hill, 492; Leslie v. Craig, 3 Wheat. 587; *In re* Heberton, 3 Phila. 436.

[5] 1 Jarman on Wills, 3d ed., 550.

ARTICLE IV.

THE EXECUTION OF WILLS.

SECTION.

539. The subject governed by statute.
540. Will must be in writing—on what material.
541. Signature of the testator—seal.
542. Attesting witnesses.
543. Holographic wills.

§ 539. **The Subject Governed by Statute.**—The formalities requisite to the execution of a will are prescribed by statute in all the States. These differ more or less in the different States, but the following essential ingredients generally enter into the execution of every valid devise. (1) It must be in writing. (2) It must be signed by the testator or some one for him at his request and in his presence. (3) It must be attested by two or more competent witnesses who must subscribe their names to the will in the presence of the testator.[1] Each of these will be considered in the order named.

§ 540. **Will must be in Writing—On what Material.**—It is well settled, that where a statute requires the formality of writing, printing is a sufficient compliance. It seems to be immaterial in what language a will is written,[2] or in what handwriting or character, so that it be fair and legible, and the meaning is sufficiently apparent.[3] Questions frequently arise, especially in the case of holographic wills, as to whether writings not directly connected, but appearing on different sheets of paper and referred to, constitute a will or a part of a will. All of such questions must be de-

[1] See Stimson's Amer. Stat., § 2640.

[2] A will drawn in accordance with instructions and duly executed with knowledge of its contents, is valid, although written in a language not understood by the testator. Walter's Will, 64 Wis. 487; *s. c.*, 54 Amer. Rep. 640. And see Worthington v. Klamm, 144 Mass. 167.

[3] Redfield on Wills, 4th ed., 166, note.

termined from the facts of each case, the main inquiry being as to the intention of the party making them.[1]

It is not, in general, material to the validity of a will, whether it be written by the testator himself or by some other person for him, provided it contains a fair and true expression of his desires.[2] But if the will be in favor of the person who writes or dictates it, the burden is upon him to show that it expresses the wishes of the testator.[3]

Greater laxity appears to have been shown in some cases in regard to the material upon which a will may be written, than is allowable in the case of deeds, on account of the exigencies of the occasion under which the former are sometimes required to be drawn. It has been held, however, that a will written upon a slate cannot be admitted to probate as a written will.[4] It appears to be the settled doctrine in England that a will written in pencil, instead of ink, is valid;[5] but whether the courts of this country will follow this lead may be regarded as exceedingly doubtful.[6]

In England, although a will written in pencil, which is obviously intended as such, is valid, writing in pencil has been regarded as a strong circumstance bearing upon the question whether the writing was preliminary or provisional merely, or was intended as a definite and determinate act of the testator. And it has been held, therefore, that altera-

[1] Baker's Appeal, 49 Amer. Rep. 454 and note; Skerritt's Estate, 67 Cal. 585. And see *In re* Shillaber, 74 Cal. 144.

[2] Harris v. Pire, 39 Md. 535. Where the testator can neither read, write nor speak, there must be not only proof of the *factum* of the will, but that the mind of the testator accompanied the act. Rollwagen v. Rollwagen, 63 N. Y. 504.

[3] Rollwagen v. Rollwagen, 63 N. Y. 504. A will is not invalidated by the fact that it was drawn by a confidential friend of the testator and that his wife was a beneficiary. Montague v. Allen, 78 Va. 592. As to holographic wills, see *infra*, § 543.

[4] Reed v. Woodward, 11 Phila. 541.

[5] Dickson v. Dickson, 1 Eccl. Rep. 222; *In re* Dyer, 1 Hagg. Ecc. 219; Rymes v. Clarkson, 1 Phillim. 22.

[6] Reed v. Woodward, 11 Phila. 541; Patterson v. English, 71 Pa. St. 454. And see Davis v. Shields, 26 Wend. 341.

tions made in pencil are to be regarded as deliberative only.[1]

§ 511. **Signature of the Testator—Seal.** — What amounts to a sufficient signing by the testator has been a question of no little controversy. The statutes of some of the States require the signature to be at the end of the instrument;[2] but in many of the States this is not expressly required, and it has been held that a will commencing with the name of the testator, and written by himself, was properly signed, if it was his intention to adopt the writing of his name at the beginning of the will as his final signature thereto.[3] And proof may be admitted to show that it was the intention of the testator to adopt the name written by himself, or the draftsman in his presence, either at the commencement or in the body of the will, as his final signature.[4] But in the very nature of things the appropriate place for the signature is at the conclusion or foot of the will, and this seems to be contemplated by a statute which requires the will to be "signed."[5]

The testator may sign the will by writing his name, or by making his mark thereto, or, if he is physically unable to write without assistance, his hand may be guided by another, and it is not necessary that any express request should be made by him for such assistance.[6]

[1] Dickenson v. Dickenson, 2 Phillim. 173; Lavender v. Adams, 1 Add. 106.

[2] California, Civil Code, § 1276; Kansas, Comp. Laws 1879, ch. 117, § 2; New York, Rev. Stat., 1875, vol. 3, p. 63, § 38; Pennsylvania, Brightly's Purd. Dig., vol. 2, p. 1474, § 6; Stimson's Amer. Stat., § 2640; Kentucky, Jones v. Jones, 3 Metc. 168. As to what is a sufficient signing of a will "at the end thereof" within the statute, see McGuire v. Kerr, 2 Brad. 244; Hallowell v. Hallowell, 88 Ind. 251. A subscription to a will by the testator after the attestation clause meets the requirement of the statute requiring the subscription to be at the end of the will. Younger v. Duffie, 94 N. Y. 535.

[3] Catlett v. Catlett, 55 Mo. 330; Watts v. Pub. Adm., 4 Wend. 168; Sisters of Charity v. Kelly, 14 N. Y. Sup. Court, 290.

[4] 1 Redfield on Wills, 4th ed., 210; Reed v. Watson, 27 Ind. 443; Adams v. Field, 21 Vt. 256; Sarah Miles' Will, 4 Dana (Ky.), 1. See State v. Wilcox, 59 Mo. 176; 4 Kent Com. 631.

[5] Catlett v. Catlett, 55 Mo. 330. See Reed v. Watson, 27 Ind. 443; 1 Redfield on Wills, 212; Chase v. Kittredge, 11 Allen, 49.

[6] Vandruff v. Rinehart, 29 Pa. St. 232; Wilson v. Beddard, 12 Simons,

Nor is it essential that the testator should write his own name. It may be signed by another person by his direction and in his presence,[1] and may even, at his request, be affixed to a will by an attesting witness.[2] The statutes of all the States are uniform in authorizing this mode of signing, and it is presumed that it would be held sufficient in the absence of any express statute on the subject.

The will must be signed by the testator before or at the time it is attested, and not afterwards.[3] The statutes usually require that the testator shall sign in the presence of the witnesses,[4] or that he shall acknowledge the signature to them to have been made by him or by his authority. Whatever may be the form of the statute, the instrument must be signed before it can be attested; and if this is not done in the presence of the witnesses, the testator must in

29; Van Hauswick v. Wiese, 44 Barb. 494; Cozzen's Will, 61 Pa. St. 196; Pool v. Buffum, 3 Oreg. 438. The fact that the testator knew how to write does not invalidate execution of a will by making his mark. Main v. Ryder, 84 Pa. St. 217.

[1] It is not necessary that a testator should have touched the paper of the will with his own hand or with the point of his pen, if the subscription of his name thereto be adopted by his acknowledgment and declaration. Merchants' Will, 1 Tuck. (N. Y.) 151. See Armstrong v. Armstrong, 29 Ala. 538; Will of Jenkins, 43 Wis. 610. A person who signs the testator's name by his direction, should sign his own name as a witness to the signature; but his failure to do so does not, in general, affect the validity of the will. In some States it subjects the party to a penalty. California, Civil Code, § 1278. See McGee v. Porter, 14 Mo. 611; St. Louis Hosp. v. Wegman, 21 Mo. 17. The fact that a will was, in the absence of the attesting witnesses, signed for the testator by another person in his presence and by his express direction, may be shown by the acknowledgment to the witnesses, or by other competent testimony as to his motions and conduct, or may be presumed from the circumstances of the case. Haynes v. Haynes, 33 Ohio St. 598.

[2] Herbert v. Berrier, 81 Ind. 1.

[3] The particular order in which the parties sign is of no consequence, provided it be done at the same time and as one transaction. Miller v. McNeil, 35 Pa. St. 217; Vaughan v. Burford, 3 Bradf. Sur. 78; Duffie v. Corridon, 40 Ga. 122.

[4] Neither the statute of frauds, nor that of Maryland copied from it, makes the validity of a will dependent on the testator's signing it in the presence of witnesses. Sterling v. Sterling, 64 Md. 138.

some way acknowledge the instrument to be his will.[1] In Mississippi a will to pass title to real estate must be in writing and signed by the testator or by some other person in his presence, and by his express direction, and if not wholly written and subscribed by the testator it must be attested by two or more credible witnesses in his presence.[2]

In Nevada and New Hampshire a will must be sealed;[3] but generally no seal is required.[4] If, however, the will is made in execution of a power which authorizes the party to dispose of the estate by gift or devise, under his hand and seal, a seal will be held indispensable to the valid execution of the power, notwithstanding the general law requires no such formality.[5]

§ 542. **Attesting Witnesses.**—In a majority of the States two or more witnesses are sufficient,[6] but in the States be-

[1] Reed v. Watson, 27 Ind. 443; 4 Kent Com. 516; 2 Greenl. Ev. 676; 1 Redfield on Wills, 221; Lamb v. Girtman, 33 Ga. 289; Holloway v. Galloway, 51 Ill. 159; Roberts v. Welch, 46 Vt. 164; *Re* Convey's Will, 52 Iowa, 197. Although the testator may not have signed in the presence of all the witnesses at once, and the witnesses did not in fact write their names at one time, yet if the testator acknowledged his signature and declared it his will to all at once, and those who had before written their names as witnesses then reaffirmed the same, it is an effective execution and attestation. Moals v. Cutting, 59 Md. 510. And see Baker v. Woodbridge, 66 Barb. 261; Yoe v. McCord, 74 Ill. 33.

[2] Everhart v. Everhart, 34 Fed. Rep. 82.

[3] Nevada, Comp. Laws, vol. 1, p. 200, § 3; New Hampshire, Gen. Stat. p. 357, § 6.

[4] Knapp v. Pattison, 2 Blackf. (Ind.) 355; Diez's Will, 50 N. Y. 88.

[5] Pollock v. Glassell, 2 Gratt. 439.

[6] Alabama, Code, 1876, § 2294; Arkansas, Dig., 1884, § 6492; California, Civil Code, § 1278; Dakota, Civil Code, § 691; Colorado, Stat. 1883, § 3192; Delaware, Laws, 1874, p. 508, § 3; Illinois, Rev. Stat. 1883, ch. 148, § 2; Indiana, Stat. 1881, § 2576; Iowa, Rev. Code, 1880, § 2326; Kansas, Comp. Laws, 1879, ch. 117, § 2; Kentucky, Gen. Stat. 1881, ch. 113, § 5; Michigan, Stat. 1882, § 5789; Minnesota, Stat. 1878, ch. 47, § 5; Mississippi, Rev. Code, 1880, ch. 46, § 1262; Missouri, Rev. Stat. 1879, § 3962; Montana, Laws 1872, p. 556, § 5; Nebraska, Comp. Stat. 1881, p. 227, § 127; Nevada, Comp. Laws 1873 § 814; New Jersey, Rev. 1877, p. 1247, § 1; New York, Rev. Stat. pt. 2, ch. 6, art. 1, § 40; North Carolina, Code, 1883, § 2136; Ohio, Stat. 1880, vol. 2, § 5916; Oregon, Gen. Laws 1872, p. 788, § 4; Rhode Island, Pub. Stat. 1882, ch. 182, § 4; Tennessee, Code, 1884, § 3003; Texas, Rev. Stat. 1879, p. 712, § 4859; Virginia, Code, 1873, p. 910, § 4; Wisconsin, Rev. Stat. 1878, ch. 103, § 2282.

low named the statutes require at least three witnesses.[1]

In some of the States, the witnesses are required to be "credible;" in others, "competent." There is no difference in legal significance between the words "competent" and "credible." The word "credible" has been construed to mean competent, and to include all persons not rendered incompetent to give testimony by reason of infancy, insanity or imbecility, interest, crime or other cause.[2] It appears to be the settled rule, that if the witnesses are competent at the time of attesting the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will.[3] And on the other hand, if the witnesses are incompetent at the time of the attestation, it will not suffice that they are competent to testify at the time of the probate of the will.[4] By statute, in some of the States, the witnesses are required to be over fourteen years of age. In the absence of any such statute, a person under fourteen is presumptively incompetent, from defect of understanding, to attest the execution of a will; but this presumption may be rebutted by proper evidence.[5]

The English Statute 25 Geo. II., ch. 6, provided that if any person should attest any will or codicil, to whom any beneficial interest was given under the will, such interest or estate as to the person attesting the will only, or any one

In Pennsylvania a will is required to be proved by two witnesses, but these are not required to be subscribing witnesses. Bright. Purd. Dig. 1872, ch. 171, § 4.

[1] Connecticut, Gen. Stat. 1875, p. 369, § 2; Florida, Dig. 1881, ch. 200, § 1; Georgia, Code 1882, § 2414; Maine, Rev. Stat. 1883, ch. 74, § 1; Maryland, Rev. Code, 1878, art. 49, § 4; Massachusetts, Pub. Stat. 1882, ch. 127, § 1; New Hampshire, Gen. Laws 1878, ch. 193, § 6; South Carolina, Gen. Stat. 1882, § 1854; Vermont, Rev. Laws, 1880, § 2042.

[2] Hawes v. Humphrey, 9 Pick. 350; Haven v. Hilliard, 23 Pick. 10; Carlton v. Carlton, 40 N. H. 14; Warren v. Baxter, 48 Me. 193.

[3] 1 Jarman on Wills, 65, 82; Amory v. Fellowes, 5 Mass. 219; Frink v. Pond 46 N. H. 125, and cases cited.

[4] Greenl. on Ev., § 691. But see 1 Redfield on Wills, 255, and cases cited.

[5] Carlton v. Carlton, 40 N. H. 14. See 1 Redfield on Wills, 254, note.

claiming under him, should be absolutely void, and such person admitted to testify. The same statute has been enacted in many of the American States, with various modifications which have heretofore been noticed.[1] Creditors are ordinarily excepted from the terms of the statute. Nor do the provisions of the statute extend to executors or devisees in trust.[2] Though where the executor is entitled to commissions on the estate, it has been held that an interest is thereby created which renders him incompetent as a witness.[3] A wife is not a competent witness to her husband's will,[4] nor is she a competent witness to a will containing a devise to her husband.[5]

In most of the States, the statutes require that the witnesses shall sign at the request and in the presence of the testator; and in some of the States they are also required to sign in the presence of each other.[6]

In respect to the first requisite it has been held that it is not material at what time the testator requests the witnesses to attest his subscription to the will, whether immediately

[1] *Ante*, § 529. The interest of an attesting witness of a will, to be disqualifying, must be a present, certain and vested interest. Lord v. Lord, 58 N. H. 7.

[2] Murphy v. Murphy, 24 Mo. 526; Orndorff v. Hummer, 12 B. Mon. 619; McDonough v. Laughlin, 20 Barb. 238; Rucker v. Lambdin, 12 S. & M. 230; Comstock v. Hadlyme Society, 8 Conn. 254; Redf. Am. Cases on Wills, 174; Millay v. Wiley, 46 Me. 230; Jones v. Larabee, 47 Me. 474; Meyer v. Fogg, 7 Fla. 292; Sawyer v. Dozier, 5 Ired. (N. C.) L. 97; Wyman v. Symmes, 10 Allen, 153; Estep v. Morris, 38 Md. 417; Children's Aid Society v. Loveridge, 70 N. Y. 387.

[3] Tucker v. Tucker, 5 Ired. (N. C.) L. 441; Taylor v. Taylor, 1 Rich. L. 531; Morton v. Ingram, 11 Ired. (N. C.) L. 368; Workman v. Dominick, 3 Strobh. L. 589; Gunter v. Gunter, 3 Jones (N. C.), L. 441; Sparhawk v. Sparhawk, 10 Allen, 155. But see McDonough v. Loughlin, 20 Barb. 238; Stewart v. Harriman, 56 N. H. 25.

[4] Pease v. Allis, 110 Mass. 157.

[5] Sullivan v. Sullivan, 106 Mass. 474.

[6] Stimson's Amer. Stat., § 2641; Roberts v. Welch, 46 Vt. 164. This fact is commonly stated in the attestation clause, but in most of the States it is not required that the witnesses shall sign in the presence of each other. Ela v. Edwards, 16 Gray, 91; Flinn v. Owen, 58 Ill. 111; Johnson v. Johnson, 106 Ind. 475; Welsh v. Adams, 63 N. H. 344.

before or immediately after such subscription, provided it be on the same occasion, and part of the same transaction.[1] Neither does it seem to be important in what language the request is made, nor whether it is proved by direct evidence, or sought to be inferred from circumstances. The question is one for the jury to determine, whether the requisite request was made.[2]

The presence of the testator implies not only that he shall be bodily present, but he must also be in a conscious state.[3] It does not seem to be requisite that the witnesses shall be in the same room, or even in the same house, or that the testator shall actually see them sign, provided he might see them subscribe their names if he would.[4] But the witnesses must be in such a situation that the testator could see the act done, and know whether the paper which they attested was his will.[5]

[1] Seguine v. Seguine, 2 Barb. 386. Under the Georgia Code a will need only be attested and subscribed in the presence of the testator. The law implies the request so to do, in the consummation of the act. Huff v. Huff, 41 Ga. 696.

[2] Rutherford v. Rutherford, 1 Denio, 33; Crittenden's Est., Merrick's Probate (Cal.), 50; Doe v. Roe, 2 Barb. 200; Remsen v. Brinckerhoof, 26 Wend. 332; Brinckerhoof v. Remsen, 8 Paige, 489; Meurer's Will, 44 Wis. 392. The witnesses to a will must attest and subscribe the will in the presence of the testator, and at his request. It is not imperative, however, that the request should proceed directly and immediately from the testator himself. If the testator requests a person to prepare his will, informing him that he desires to make his will, and the will is prepared for execution in compliance with such request, and when ready for execution, the person who prepared the will calls upon persons present, in the presence and hearing of the testator, to attest and subscribe it, and in the presence of the testator and with his knowledge, they attest and subscribe it as attesting witnesses, it is, in contemplation of law, attested and subscribed by the request of the testator. Bundy v. McKnight, 48 Ind. 502. The New Jersey statute does not require the testator to ask the witnesses to the will to witness its execution. Ayers v. Ayers (N. J.), 12 Atl. Rep. 621.

[3] 1 Jarman on Wills, 80; 2 Greenl. Ev., § 678.

[4] Spoonemore v. Cables, 66 Mo. 579; Downie's Will, 42 Wis. 66; Mandeville v. Parker, 31 N. J. Eq. 242; Riggs v. Riggs, 135 Mass. 238; *s. c.*, 46 Amer. Rep. 464; Storey's Will, 20 Ill. App. 183; Maynard v. Vinton, 59 Mich. 139.

[5] 1 Redfield on Wills, 248, 249; McElfresh v. Guard, 32 Ind. 408; Meurer's Will, 44 Wis. 392.

In New York, the statute does not require that the signing by the attesting witnesses shall be in the presence of the testator.[1] But it must be done at the time the will is executed, and with the knowledge and consent of the testator.[2]

The same rules apply to the signature of a witness as to that of the testator, so far as to permit a witness to sign by mark;[3] or, if the witness cannot write, his hand may be guided by another.[4] But, according to the English cases, he cannot adopt a signature written by another, or by himself at another time.[5] This rule has not always been followed in this country,[6] and a late case in New Hampshire holds that on principle where an attesting witness to a will is unable to write, all the purposes to be accomplished by attestation are as readily attained where the name of the witness is written for him by another at his request, as where the latter makes his mark or holds a pen guided by another hand.[7] But the weight of authority seems to favor the proposition that, under a statute requiring the witnesses to subscribe the instrument in the presence of the testator, they must do some present act of attestation. It is not enough that they acknowledge signatures made the day before the execution of the will.[8] A person, to become a subscribing witness to a will, must sign his name or make

[1] Lyon v. Smith, 11 Barb. 124; Rudden v. McDonald, 1 Brad. 352.

[2] If the witnesses did not see the testator sign nor see his signature or seal on account of the way the paper was folded when presented to them to sign, or hear the testator acknowledge his signature, the will cannot be probated. *Re* Mackay, 44 Hun (N. Y.), 571.

[3] Ford v. Ford, 7 Humph. 92; Pridgen v. Pridgen, 13 Ired. (N. C.) 259; Meehan v. Rourke, 2 Brad. 385.

[4] Harrison v. Elvin, 3 Q. B. 117; *Re* Frith, 4 Jur. (N. S.) 288; Campbell v. Logan, 2 Brad. 90.

[5] 1 Jarman on Wills, 77, and cases cited.

[6] Pollock v. Glassell, 2 Gratt. 439; Jesse v. Parker, 6 Gratt. 57; Upchurch v. Upchurch, 16 B. Mon. 102.

[7] Lord v. Lord, 58 N. H. 7; *s. c.*, 42 Amer. Rep. 565.

[8] Chase v. Kittredge, 11 Allen, 49. So held, where the signatures were made in the presence of the testator, the will not being signed by the testator. Duffie v. Corridon, 40 Ga. 122.

his mark, or do some physical act toward affixing or recognizing his name, which he intends as a subscription. He must be aware of the character of the act, and must subscribe his name *animo testandi*.[1] The statutes in some of the States require that the witnesses shall sign at the end of the will,[2] and this is so obviously the appropriate place for their signatures, that questions will seldom arise in reference to it, though in a late case in New York where there is such a provision of statute, a will written upon two sides of a piece of paper, and signed by the witnesses at the bottom of the first and at the top of the second side, an important provision of the will following the last signatures is not executed in compliance with the statute.[3] The signatures of the witnesses should be as low, if not lower, than that of the testator, thus showing that their signatures were subsequent to that of the testator.

As a matter of precaution, it is required in some States that the witnesses shall write opposite to their names their respective places of residence. A failure to comply with this provision usually subjects the defaulting party to a penalty, but does not invalidate the instrument or attestation.[4]

It does not appear to be absolutely essential that there should be any attestation clause. The entire omission of the attestation clause was held not sufficient to rebut the presumption in favor of the due execution of the instrument.[5] But it is always desirable to add an attestation clause to a will, since it serves to show, when complete, that the testator, or person preparing the will, was aware of

[1] Roberts v. Welch, 46 Vt. 164.

[2] New York, California, Arkansas, Dakota, Montana; and this is imperative. *Re* Case, 4 Denio (N. Y.), 124.

[3] Hewitt's Will, 91 N. Y. 261; O'Neil's Will, *Id.* 516. And see Moale v. Cutting, 59 Md. 510.

[4] New York, California, Dakota, Montana. See Stimson's Amer. Stat., § 2644; *Re* Phillips, 98 N. Y. 267.

[5] Pollock v. Glassell, 2 Gratt. 439; Redfield's Am. Cases on Wills, 622; Dean v. Dean, 27 Vt. 746; *Re* Phillips, 98 N. Y. 267.

the specific requirements for the due execution of the instrument, and raises a strong presumption that they have been complied with. Besides, it aids the recollection of the witnesses as to what specific acts were done.[1]

In many of the States, by statute, the testator must, at the time of making or acknowledging his subscription to the will, give the witnesses to understand that the paper signed is his will; otherwise there is no sufficient publication.[2] But no set of words is required to publish a will.[3] It is sufficient if the testator, at the time of its execution, was fully apprised of its contents, knew it to be his will, and showed by his conduct that he intended it as such.[4] The publication may be inferred from all the circumstances.[5] And in some of the States it has been held that witnesses

[1] Inability of the subscribing witnesses to recollect that they signed at the request of the testator, does not authorize a finding that the statute requirements were not observed. Brown v. Clark, 77 N. Y. 369; *Re* Bogart, 67 How. (N. Y.) Pr. 117.

[2] Bagley v. Blackman, 2 Lans. (N. Y.) 41; Remsen v. Brinckerhoof, 26 Wend. 325; Roberts v. Welch, 46 Vt. 164; *Ex parte* Beers, 2 Bradf. (N. Y.) 163. See Hunt v. Mootrie, 3 *Id.* 322; Irwin v. Irwin, 1 Redf. (N. Y.) 495; *Re* Sheridan, *Id.* 447; Baker v. Woodbridge, 66 Barb. 261. Ludlow v. Ludlow, 36 N. J. Eq. 597.

[3] *Re* Beckett, 35 Hun (N. Y.), 447.

[4] Cilley v. Cilley, 34 Me. 162. See Reeve v. Crosby, 3 Redf. (N. Y.) 74; Hollenbeck v. Van Valkenburgh, 5 How. Pr. 281; Buntin v. Johnson, 28 La. Ann. 796; Torrey v. Bowen, 15 Barb. 304; Hunn v. Case, 1 Redf. (N. Y.) 307; Harrington v. Stees, 82 Ill. 50; Lane v. Lane, 95 N. Y. 494. A testator's acknowledgment of his signature in presence of the witnesses is sufficient. Webb v. Fleming, 30 Ga. 808; Seguine v. Seguine, 2 Barb. 385; Robinson v. Smith, 13 Abb. Pr. 359; Meurer's Will, 44 Wis. 392. The writing, signing and attesting constitute a sufficient publication. Ray v. Walton, 2 A. K. Marsh. 71; Osborn v. Cook, 11 Cush. 532; Dean v. Dean, 27 Vt. 746; Black v. Ellis, 3 Hill (S. C.), 68.

[5] Rogers v. Diamond, 13 Ark. 474; Haynes v. Haynes, 33 Ohio St. 598. Under the statute of Indiana, a testator need not, at the time of executing the will, inform the subscribing witnesses that the instrument which they are to sign is a will; nor need he see the witnesses subscribe their names to the will. It is sufficient if the instrument is subscribed in his presence. But the witnesses must know that the paper which they have subscribed is the one which the testator signed. Turner v. Cook, 36 Ind. 129. And see McKinley v. Lamb, 64 Barb. 199; Thompson v. Seastedt, 6 Thomp. & C. 78.

to a will need not know the contents thereof, nor that the instrument is a will, and that they simply attest the genuineness of the signature.[1]

§ 543. **Holographic Wills.**—In the States below mentioned, a will, wholly written and signed by the testator himself, will take effect on proof of his handwriting and signature, although there be no attesting witnesses.[2] The handwriting and signature of the testator are required to be proved in such case, in some States by two, and in others by at least three disinterested witnesses. In the case of a holographic will, a substantial compliance with the statute prescribing the method of publication is sufficient.[3]

[1] Flood v. Pragoff, 79 Ky. 607; Webb v. Fleming, 30 Ga. 808; Dickie v. Carter, 42 Ill. 376; Brown v. McAlister, 34 Ind. 375; Hulse's Will, 52 Iowa, 662; Osborn v. Cook, 11 Cush. 532; Verdies v. Verdies, 8 Rich. L. 135; Young v. Barrett, 27 Gratt. 96; Allen's Will, 25 Minn. 39; Allen v. Griffin, 69 Wis. 529.

[2] Arkansas, Dig. 1884, § 6492; California, Civil Code, § 6277. And see Billings' Estate, 64 Cal. 427; Kentucky, Gen. Stat. 1881, ch. 113, § 5. And see Toebbe v. Williams, 80 Ky. 661; Mississippi, Rev. Code 1880, ch. 46, § 1262; North Carolina Code, 1883, § 2136; Pennsylvania, Purd. Dig. 1872, ch. 171, § 4. And see Fosselman v. Elder, 98 Pa. St. 159; Tennessee, Code 1884, § 3004; Texas, Rev. Stat. 1879, p. 712, § 4860; Virginia, Code 1873, p. 910, § 4; West Virginia, Code 1882, ch. 84, § 3. But in two States (Tennessee and North Carolina), it is not good unless found among the valuable papers and effects of the deceased or lodged in the house of another for safe keeping.

[3] *Re* Beckett, 103 N. Y. 167.

CHAPTER XIV.—Of the Revocation and Republication of Wills.

Article I. Revocation.
II. Republication.

ARTICLE I.

REVOCATION.

SECTION.
546. A will always a revocable instrument.
547. Methods of revoking wills.
548. Revocation by subsequent will or codicil.
549. By the cancellation or destruction of the will.
550. By the alienation or alteration of the estate.
551. By marriage and birth of issue.

§ 546. **A Will is always a Revocable Instrument** during the life of the testator, even though it be declared irrevocable in the strongest terms, because a man cannot, by any act of his own, make that irrevocable which in the judgment of the law is in its very nature revocable at his pleasure. But it seems to be settled that a conjoint or mutual will is irrevocable, in equity, after the death of one of the parties.[1] And where two persons are authorized to dispose of an estate by will, and they jointly make and duly execute a will, it is not in the power of either, by separate act, to revoke the will so made.[2]

[1] Day, *Ex parte*, 1 Bradf. (N. Y.) 476, and cases cited.

[2] Brenthitt v. Whittaker, 8 B. Mon. (Ky.) 530. Where a deed conveyed land in trust for the uses declared in a will, it was held that neither the deed nor the will were revocable. Mayor, etc. v. Williams, 6 Md. 235.

§ 547. **The Several Modes in which a Will may be Revoked** are divided into two general classes, namely, by act of the party, and by implication of law. The first mentioned class come within the provisions of the Statute of Frauds which requires that the revocation of a will shall be by an instrument executed with the same formality as the will itself, or by some positive act of the testator which clearly evinces his intention to revoke or destroy it, such as burning, tearing, obliterating, or otherwise canceling or destroying it. A will duly executed cannot, therefore, be revoked by a subsequent will, or other writing of the testator, unless such instrument be executed and attested as is requisite to make a valid will.[1] And it cannot be offered in evidence as a revocation without a probate.[2]

A will may be revoked by implication or inference of law on account of certain changes in the testator's situation in life, as by marriage and birth of issue, or by alienation of the estate, which do not come within the purview of the statute. Each mode of revocation will be considered in separate sections.

§ 548. **Revocation by Subsequent Will or Codicil.**[3]— It seldom happens that a testamentary instrument is executed for the mere purpose of revoking a will, and therefore such instruments need not be considered.[4] The most obvious mode of revoking a prior will, when a new one is to be executed, is by an express clause in the subsequent will revoking all former wills. This clause is usually inserted in all wills, and is recommended wherever such is the inten-

[1] Breathitt v. Whittaker, 8 B. Mon. (Ky.) 530; Reid v. Borland, 14 Mass. 208; Hollingshead v. Sturgis, 21 La. Ann. 450; Deakins v. Hollis, 7 Gill & J. 311; Laughton v. Atkins, 1 Pick. 535; Blanchard v. Blanchard, 32 Vt. 62.

[2] Laughton v. Atkins, 1 Pick. 535.

[3] See Stimson's Amer. Stat. § 2673.

[4] We have seen in a previous section that a subsequent will, or other instrument in writing designed as a revocation, must, to have that effect, be executed and attested the same as an original will is required to be executed. *Ante*, § 547.

tion of the testator, in order that there may be no doubt or uncertainty upon the point. It is true that a man cannot die with two testaments, and, therefore, if there be two properly executed wills making different dispositions of the same property, the former will be revoked, so far as concerns the property, by the mere making of the latter, without any clause of revocation whatever.[1] But if such wills are not inconsistent with each other, they may be probated as together constituting the last will of the deceased.[2] The general rule is that a subsequent will does not revoke a prior one, but is to be taken as cumulative, unless it contains a clause of revocation, or is inconsistent with the former will; and if the inconsistency be only partial, it is a revocation *pro tanto* only.[3] But if the second will or codicil expressly revokes all former wills, the latter cannot be admitted to probate, even though the revoking will makes no disposition of the property disposed of in the will revoked.[4] And it has been held that a later will, properly executed, revoking former wills, is effectual as a revocation though having been lost or destroyed, its contents (other than the revocatory clause) cannot be proved so that it can be allowed and executed as a will.[5] The clause of revocation, however, is open to explanation, and, if it can be shown to

[1] Evans v. Evans, 17 Sim. 107; Clarke v. Ransom, 50 Cal. 595; Reese v. Probate Court, 9 R. I. 434; Brant v. Willson, 8 Cow. 56; Bartholomew's Appeal, 75 Pa. St. 169. Where a clause in the original will and one in a codicil thereto are entirely inconsistent, and both cannot be executed, the latter clause must prevail. Pickering v. Langdon, 22 Me. 413; Van Vechten v. Keator, 63 N. Y. 52; Brownfield v. Wilson, 78 Ill. 467; Dean's Prin. Conv. 440. A codicil will operate to revive or republish a will and revoke another made before the codicil, and after the will to which it is annexed, unless such effect is negatived by the contents of the codicil itself. Neff's Appeal, 48 Pa. St. 501. The execution of a third will is a revocation of two former wills, although the last will is lost or mislaid, in which case parol evidence of its contents is admissible. Legare v. Ashe, 1 Bay (S. C.), 464.

[2] 1 Redfield on Wills, 350.

[3] Brant v. Wilson, 8 Cowen, 56; Nelson v. McGiffert, 3 Barb. Ch. 158.

[4] Matter of Thompson, 11 Paige (N. Y.), 453.

[5] *In re* Cunningham (Minn.), 36 N. W. Rep. 269.

have been inserted contrary to the intention of the testator, it will be void.

§ 549. **Revocation by Cancellation or Destruction of the Will.**[1]—To effect a revocation by cancellation or destruction of the will, there must be a concurrence of action and intention.[2] The act of burning, canceling or tearing is nothing, unless it be done with the intention of revoking the instrument, and not by accident or mistake.[3] And this doctrine has been carried to the extent of holding that the destruction of a will by the maker in a fit of temporary insanity is not a revocation.[4] On the other hand, if done with the intention of revoking the will, the act of spoliation may be very slight,[5] such as partially tear-

[1] As to provisions of Statute, see Stimson's Amer. Stat., § 2672.

[2] But if a will be canceled with the intention to make a new will and that purpose fails, the cancellation will be deemed to have been conditional, and will have no effect. Bethell v. Moore, 2 Dev. & B. 311; Jackson v. Halloway, 7 Johns. 394; Barksdale v. Barksdale, 12 Leigh, 535; Stover v. Kendall, 1 Coldw. 557; Seemes v. Seemes, 7 Harr, & J. 388; Means v. Moore, 3 McCord, 282; Harriston v. Harriston, 30 Miss. 276; Banks v. Banks, 65 Mo. 432; Wolf v. Bollinger, 62 Ill. 368. If an indorsement be made on a will indicating an intention to alter or modify it at a future day, this is no revocation of the will. Ray v. Walton, 2 A. K. Marsh. 71.

[3] Wright v. Wright, 5 Ind. 389; Dickey v. Malechi, 6 Mo. 177; Burns v. Burns, 4 Serg. & R. 295; Burtonshaw v. Gilbert, Cowp. 52; Wolf v. Bollinger, 62 Ill. 378. As to what evidence is sufficient to rebut the presumption that a will was destroyed *animo revocandi*. Dawson v. Smith, 3 Houst. (Del.) 335. Where the testator having two wills intends to destroy one, but by mistake destroys the other, the destroyed will may be established as the will of the deceased on proof of its contents, and in order to revive and establish that will the law does not require such proof as is necessary to give validity to an original will. Burns v. Burns, 4 Serg. & R. 295. If a testator, being induced to believe that his will is invalid, tears it and puts it in the fire, but afterwards, thinking that he may be misinformed, he takes the pieces from the fire and carefully preserves them, there is no *animus revocandi*, and the will as contained in the pieces will be established. Giles v. Warren, L. R. 2 P. & D. 401.

[4] Forbing v. Weber, 99 Ind. 588.

[5] If the destruction be as complete as was in the power of the testator, it will operate as a revocation. Sweet v. Sweet, 1 Redf. 451; Avery v. Pixley, 4 Mass. 460; Johson v. Brailsford, 2 Nott & McC. 272. The

ing it,[1] drawing lines across it,[2] tearing off the signature of the testator, or of the attesting witnesses,[3] burning it slightly, or crumpling it up and throwing it on the fire, and though it were privately rescued and saved, this would be a sufficient revocation.[4] But the act must be done and not merely intended. The intention of the testator to destroy it, or his belief that it has been done, will not amount to a revocation, unless some act be done towards the accomplishment of that purpose.[5] A will cannot be revoked by any intention of the testator, even though such intention is evidenced by a written statement, unless the statutory forms are complied with, or the acts done amount to a revocation by cancellation of the will.[6] The question has

degree of destroying or cancellation must depend upon the circumstances of each case. Bohanan v. Walcot, 1 How. (Miss.) 336. Where the maker of a will, with the intention of revoking it, burned a paper which she thought to be her will, but, by mistake or fraud of others, burned a different paper, and continued in the belief that she had revoked the will, without knowledge of its existence, this was held to amount to a revocation. Smiley v. Gambill, 2 Head (Tenn.), 164.

[1] Mole v. Thomas, 2 W. Bl. 1043.

[2] The cancellation of a will by drawing lines across it is an equivocal act and may be explained by circumstances. Bethell v. Moore, 2 Dev. & B. (N. C.) L. 311.

[3] Though a seal is not requisite to a will, yet if one is affixed to it and is torn off, this will amount to a revocation if so intended. Avery v. Pixley, 4 Mass. 460.

[4] White v. Casten, 1 Jones (N. C.) L. 197.

[5] Gains v. Gains, 2 A. K. Marsh. (Ky.) 190; Smiley v. Gambill, 2 Head (Tenn.), 164; Jackson v. Betts, 9 Cow. (N. Y.) 208. See Delafield v. Parish, 1 Redf. (N. Y.) 1; *s. c.*, 25 N. Y. 9; Blanchard v. Blanchard, 32 Vt. 62; Nelson v. Pub. Admr., 2 Bradf. (N. Y.) 210; Warner v. Warner, 37 Vt. 356; Perjue v. Perjue, 4 Iowa, 520; Ray v. Walton, 2 A. K. Marsh. (Ky.) 71; Witter v. Mott, 2 Conn. 67; Brown v. Thorndike, 15 Pick. (Mass.) 388; Clark v. Eborn, 2 Murph. 235; Glasscock v. Smither, 1 Call, 179; Marr v. Marr, 2 Head, 303; Clark v. Smith, 34 Barb. 140; Barker v. Bell, 46 Ala. 216; Timen v. Claffey, 45 Barb. 438; Spoonemore v. Cables, 66 Mo. 579.

[6] Dower v. Seeds, 28 W. Va. 113; Slaughter v. Stephens, 81 Ala. 418. He must execute some one of the acts prescribed by the statute to effect his intention of revocation. Means v. Moore, 3 McCord (S. C.), 282; Gains v. Gains, 2 A. K. Marsh. (Ky.) 190; Clark v. Smith, 34 Barb. 140; Heise v. Heise, 31 Pa. St. 246; Wright v. Wright, 5 Ind. 389.

been much discussed, both in England and in this country, whether the mere cancellation of a will containing a clause revoking former wills does or does not revive a former will. Upon this question the authorities are neither few nor uniform.[1] In England and in some of the States the controversy has been settled by a statutory declaration that an earlier will shall not be revived by the cancellation of a later one, unless such intent appears in the terms of the revocation, or the first will be duly republished after such cancellation.[2] But in the absence of statute the weight and tendency of authorities seems to be in favor of the proposition that such cancellation shall not operate as a revival of a former will, in the absence of evidence to show that testator intended and meant to so revive it, and for that purpose declarations of the testator are admissible in evidence.[3]

It requires the same capacity to revoke a will that it does to make one.[4] The testator must be capable of understanding the nature and effect of the act; and must perform it, or direct it to be done, freely and voluntarily. And if a will has been destroyed by mistake, or through fraud or deception, it may be established by proof of its contents.[5]

[1] See note to Pickens v. Davis, 45 Amer. Rep. 322, 327.

[2] New York, Rev. Stat., pt. 2, ch. 6, art. 1, § 53; Ohio, Rev. Stat., 1880, § 5960; Indiana, Rev. Stat., 1881, § 2559; Kansas, Comp. Laws 1879, ch. 117, § 38; Missouri, Rev. Stat., 1879, § 3968; Arkansas, Dig. 1884, § 6503; California, Hitt. Code, 1876, § 6297; Nevada, Comp. Laws, 1873, § 820; Georgia, Code 1882, § 2472; Alabama, Code, 1876, § 2297; Dakotah, Civ. Code, § 707.

[3] Pickens v. Davis, 134 Mass. 252; Harwell v. Harwell, 30 Ga. 315; Williams v. Williams, 142 Mass. 515; McClure v. McClure (Tenn.), 6 S. W. Rep. 44. And see Williams v. Williams, 142 Mass. 515.

[4] Ladd's Will, 60 Wis. 187.

[5] As to the subject generally, see 1 Redf. on Wills, 303-332; 3 Washb. Real Prop., 4th ed., 535; 4 Kent's Com., 521; Willard on Real Est. and Conv., 493. If the will were entirely destroyed during insanity, there could be no revocation on that account; for a testator can no more revoke his will, he being insane, than he can while insane make a competent and valid will. Smith v. Wait, 4 Barb. 28; Rhodes v. Vinson, 9 Gill, 169; Ford v. Ford, 7 Humph. 92; Forman's Will, 54 Barb. 274; Forbing v. Weber, 99 Ind. 588. "If a person of sound mind had made a will, and afterwards, when of unsound mind, had been prevailed upon to make another, revoking the former, it could not be pretended

§ 550. **Revocation by the Alienation or Alteration of the Estate.**—There is an implied revocation in the nature of ademption, which arises either when the subject of the bequest is altered or parted with by the testator, or when the purpose for which it was bequeathed has been provided for by him by other means. It is to be remembered that a will cannot operate upon any property in which the testator has no interest at the time of his death and when the will takes effect. Therefore, the general rule is that, if after making a will the testator executes any legal conveyance of the devised property, the will is revoked.[1] But a conveyance of a portion of the estate amounts only to a revocation *pro tanto*.[2] So if the alteration of the testator's circumstances be such as to render it impossible to execute any part of his will, it will be considered as entirely revoked: but if it can be partly executed, the revocation is as to the part which cannot be carried into effect only.

It was the doctrine of the common law that the interest the testator had in the property, at the time he made his will, should continue to be the same and remain unaltered till his death, and the least alteration of his interest in it was a revocation, on the ground that it was evidence of an alteration of the testator's mind.[3] If, therefore, a testator, subsequently to his will, by deed aliened lands, which he

that the latter should be set up as a revocation." Parker, C. J., in Laughton v. Atkins, 1 Pick. 535.

[1] Epps v. Dean, 28 Ga. 533; Bowen v. Johnson, 6 Ind. 110; Walton v. Walton, 7 Johns. Ch. 258.

[2] Haws v. Humphrey, 9 Pick. 350; Brown v. Thorndike, 15 Pick. 388; Hogan v. Small, 11 S. & R. 141; Walton v. Walton, 7 Johns. Ch. 258; Adams v. Winne, 7 Paige, 101; Herrington v. Budd, 5 Denio (N. Y.), 323; Bush v. Bush, 11 Ohio, 287; Carter v. Thomas, 4 Greenl. 341; McTaggart v. Thompson, 14 Pa. St. 149; Bowen v. Johnson, 6 Ind. 110; Epps v. Dean, 28 Ga. 533; Wells v. Wells, 35 Miss. 638. If a testator devises both real and personal estate, and by an alienation of the real estate revokes the will *pro tanto*, it then stands as a will of personal estate only, and is revocable, accordingly, by any writing sufficient to revoke a will of personal estate. Brown v. Thorndike, 15 Pick. (Mass.) 388. See Balliett's Appeal, 14 Pa. St. 451.

[3] Coulson v. Holmes, 5 Sawyer C. C. 279.

had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise which was necessarily void.[1] But this rule has been changed by statute in many of the States, whereby the will takes effect upon the estate of which the testator dies seized.[2] It was early established that a mortgage of devised lands did not work a revocation of the will, in equity.[3] It is only a revocation *pro tanto*.[4] So, a conveyance in trust for the payment of debts of the grantor does not absolutely revoke the devise, but only to the extent of such special purpose.[5] But where the testator makes an absolute conveyance of the devised land, it has the effect to revoke the will: notwithstanding the conveyance be to the devisee. The latter will then hold under the deed, and not under the will.[6] Nor would the effect be altered, if the testator should sell and convey the land devised, and take back a bond and mortgage for the whole or a part of the purchase-money. The conveyance is not merely an alteration of the estate, but divests the testator of the entire title.[7] A mere contract for the sale of land devised is a revocation of the will in equity.[8] So also an

[1] 1 Jarman on Wills, 5th Am. ed., 308; 4 Kent's Com. 530. See Walton v. Walton, 7 Johns. Ch. 258; Adams v. Winne, 7 Paige, 97; Herrington v. Budd, 5 Denio, 321.

[2] See *ante*, § 534; Woolery v. Woolery, 48 Ind. 523. A will is not revoked by the death of legatees or devisees named in it, by the marriage of the testator, there being no issue, by the alienation of the larger portion of his estate which was specifically disposed of by the will, by the acquisition of a much greater estate than he possessed at the time the will was made, nor by the concurrence of all these circumstances. Hoitt v. Hoitt, 63 N. H. 475.

[3] Hall v. Dench, 1 Vern. 329; Sparrow v. Hardcastle, 3 Atk. 805.

[4] McTaggart v. Thompson, 14 Pa. St. 149; Stubbs v. Houston, 33 Ala. 555.

[5] Jones v. Hartley, 2 Wheat. 103; Livingston v. Livingston, 3 Johns. Ch. 148; Padfield v. Padfield, 72 Ill. 322. Neither would a conveyance to a trustee for use of a wife operate as a revocation. Clingan v. Mitcheltree, 31 Pa. St. 25.

[6] Rose v. Rose, 7 Barb. 174.

[7] Adams v. Winne, 7 Paige, 97; Brown v. Brown, 16 Barb. 572.

[8] Mayer v. Gowland, Dick. 563; Bosley v. Bosley, 14 How. 390. But see Hall v. Bray, 1 N. J. L. 212.

attempt to convey the land, which shows a clear intent to revoke, will have that effect, although the conveyance failed to take effect for want of some essential requisite. There are, however, some exceptions to this rule. A void conveyance to charitable uses, or a deed void for fraud, will not revoke a devise.[1]

§ 551. **The Marriage of the Testator and Birth of a Child,** when both occur subsequent to the making of the will, has always been regarded, at common law, as an implied or presumed revocation, on the ground of supposed change in intention with the change of condition of the testator, by which he assumed new moral obligations.[2] But such implied revocation may be rebutted by circumstances showing that the testator intended the will to stand.[3] It seems that neither a subsequent marriage nor subsequent birth of a child alone would amount to a revocation,[4] except in the case of an unmarried woman whose will, on her becoming covert, was revoked, and that, too, though her testamentary capacity was subsequently restored by the death of her husband.[5]

In this country the subject is governed by a great contrariety of statutory enactments. Thus, in some of the States it is enacted that, if, after the making of a will by an unmarried woman, she marries, her marriage shall operate as a revocation of her will.[6] But in other States it is

[1] 1 Redfield on Wills, 343; 1 Jarman on Wills, 5th Am. ed., 329.

[2] Brady v. Cubitt, Doug. 31.

[3] Brush v. Wilkins, 4 Johns. Ch. 506; Havens v. Van Den Burgh, 1 Denio, 27; Wheeler v. Wheeler, 1 R. I. 364. The English courts have held, however, that no such evidence is admissible to rebut the revocation implied by marriage. Goodtitle v. Atway, 2 H. Bl. 522; Doe v. Lancashire, 5 T. R. 61; Kenbal v. Scrafton, 5 Ves. 663; Marston v. Roe, 8 Ad. & El. 14.

[4] 1 Jarman on Wills, 5th Am. ed., 270; Brush v. Wilkins, 4 Johns. Ch. 506; Bowers v. Bowers, 53 Ind. 438.

[5] 2 Greenl. Ev., § 681; 1 Powell on Devises, 545; 1 Jarman on Wills, 5th Am. ed., p. 270; Walker v. Hall, 34 Pa. St. 483; Fransen's Case, 26 Pa. St. 204.

[6] Arkansas, Dig. 1884, § 6496; California, Civil Code 1876, § 6300; Illinois, Stat. 1883, ch. 39, § 10; McAnulty v. McAnulty, 11 N. E. Rep. 397; Indiana, Rev. Stat. 1881, § 2562; Missouri, Rev. Stat. 1879, § 3965; Massa-

provided that such will shall not be revoked by marriage.[1] And this has been held to be the effect of a statute which makes all the property of a married woman her separate estate and empowers her to dispose of it by will, since the reason of the rule, by which marriage operated as a revocation of her will, no longer exists in such case.[2] Though a recent Massachusetts case holds that under the statute prescribing the modes of revoking a will and recognizing revocation, "implied by law from subsequent change in the condition or circumstances of the testator," a woman's will is revoked by her subsequent marriage.[3]

Again, in several of the States, it is provided that "every will, made by a man or woman, shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heirs, personal representatives, or next of kin." [4] In other States, the provision is, that marriage of the testator and birth of a child is a revocation, unless provision is made in the will in contemplation of such event.[5] In Nevada and Delaware, the statutes provide that marriage shall revoke the will,

chusetts, see Blodgett v. Moore, 141 Mass. 75; New York, Rev. Stat., pt. 2, ch. 6, art. 1, § 44; Oregon, Stat. 1872, ch. 64, § 7; Rhode Island, Pub. Stat. 1882, ch. 182, § 6.

[1] Ohio, Rev. Stat. 1880, § 5958.

[2] *In re* Tuller, 79 Ill. 99; Webb v. Jones, 36 N. J. Eq. 163; Fellows v. Allen, 60 N. H. 439; *s. c.*, 49 Amer. Rep. 328, with note: Ward's Will, 70 Wis. 251.

[3] Swan v. Hammond, 138 Mass. 45. And see Nutt v. Norton, 142 Mass. 242.

[4] Kentucky, Gen. Stat. 1881, ch. 113, § 9; North Carolina, Rev. 1883, § 2177; Virginia, Code 1873, p. 910, § 7; West Virginia, Rev. Stat. 1882, ch. 84, § 6. In Illinois, Rhode Island, Connecticut, Virginia, West Virginia, Kentucky, North Carolina and Missouri, the will of a man is revoked by subsequent marriage. Tyler v. Tyler, 19 Ill. 151; American Board v. Nelson, 72 Ill. 564; Duryea v. Duryea, 85 Ill. 81; Stimson's Amer. Stat., § 25.

[5] Alabama, Code 1876, §§ 2282, 2283; Arkansas, Dig. 1884, § 6495; California, Civil Code, § 1298; Connecticut, Gen. Stat., 1875, p. 370; § 6; Missouri, Rev. Stat., 1879, § 3964; New York, Rev. Stat., vol. 3, p. 63, § 41; Oregon, Gen. Laws 1872, ch. 64, § 6.

unless provision be made for the wife.[1] And in several of the States, the birth of a posthumous child, for whom no provision is made, revokes a will.[2] In many of the States, there are no statutes in regard to implied revocations, in some of which they appear to be abolished,[3] while in others the statutes, providing for express revocations, provide also, that nothing therein shall be construed to prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator.[4]

ARTICLE II.

REPUBLICATION.

SECTION.

553. Express republication.

554. Constructive republication.

§ 553. **Express Republication.**—A will once revoked cannot be republished by parol. As a general rule, the same forms and solemnities are requisite for the republication of a will as for its original publication.[5] Republication is

[1] Nevada, Comp. Laws, § 821; Delaware, Laws 1877, ch. 84, § 23. And see Stokes v. O'Fallon, 2 Mo. 29; Walker v. Hall, 34 Pa. St. 483; Edward's Appeal, 47 Ind. 114.

[2] Iowa, Rev. Code, 1880, § 2334; Maine, Rev. Stat., 1871, ch. 74, § 8; Texas, Rev. Stat., 1879, § 4867; Mississippi, Rev. Code, 1880, ch. 46, § 1264; Morse v. Morse, 42 Ind. 365. In Georgia, by statute "marriage or birth of child" constitutes a revocation. Code, 1873, § 2477; Hart v. Hart, 70 Ga. 764.

[3] Colorado, Laws 1877, p. 930, § 4; North Carolina, Code, 1883, § 2178.

[4] Arizona, Comp. Laws, ch. 28, § 9; Maine, Rev. Stat., 1861, ch. 74, § 3; Massachusetts, Gen. Stat., ch. 92, § 11; Michigan, Comp. Laws, ch. 154, § 9; Minnesota, Stat., 1873, ch. 35, § 9; Nebraska, Comp. Stat., 1881, p. 227, § 132; Vermont, Rev. Laws, 1880, § 2047.

[5] Jack v. Shoenberger, 22 Pa. St. 416; Barker v. Bell, 46 Ala. 216; Love v. Johnston, 12 Ired. 355; Warner v. Warner, 37 Vt. 356; Carey v. Baughn, 36 Iowa, 540. But in Pennsylvania this does not prevent a

equivalent to making the will anew; that is, the will republished is a new one, and, upon the principle that of any number of wills the last and newest is in force, it revokes any will inconsistent with it, of a date prior to the republication. A will may also be republished by a new will, as where the testator by a subsequent will revoke the revocatory will, and by its terms shows that it was the intention to revive and give effect to the first will.[1]

§ 554. **Constructive Republication.**—A codicil duly executed is a constructive republication of the will to which it refers, whether it is annexed to the will or not; for it furnishes conclusive evidence that the testator considered his will as still existing.[2] So, a codicil may republish a will, so as to give effect to a devise otherwise void on account of the devisee being a witness to the original will.[3] And a will not duly attested, or made under undue influence, may be republished and made operative by a codicil properly executed afterward when the testator is free from such influence; but it should distinctly refer to it, or be annexed to the will.[4] But if it should appear on the face of the codicil that it was not the intention of the testator to republish a former will, the ordinary presumption derived from the existence of a codicil in that respect will be counteracted.[5] The codicil, when made, brings the will to it

parol republication. Jones v. Hartley, 2 Whart. 103. But *contra*, Witter v. Mott, 2 Conn. 67; Warner v. Warner, 37 Vt. 356; Love v. Johnston, 12 Ired. 355; Cogdell v. Cogdell, 3 Desaus. 346; Carey v. Baughn, 36 Iowa, 540.

[1] Under the Virginia Code, 1873, ch. 118, § 9, it was held that revoking a will which contained a revocation of a previous will did not revive the former will. Rudisill v. Rodes, 29 Gratt. 147. So, in Missouri, a first will is not revived by the revocation of the second, unless the former will be duly republished. Beaumont v. Keim, 50 Mo. 28.

[2] Williams on Executors, 184; Moores v. White, 6 Johns. Ch. 375; 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; McCurdy v. Weall (N. J.), 7 Atl. Rep. 566.

[3] Willard on Real Estate and Conveyancing, 499.

[4] Stover v. Kendall, 1 Coldw. 557; Harvy v. Chouteau, 14 Mo. 587; O'Neal v. Farr, 1 Rich. 80.

[5] Kendall v. Kendall, 5 Munf. 272; Van Cortland v. Kip, 1 Hill, 590.

and makes it a will from the date of the codicil, no matter how long it may have been written, or what its original date may be.[1] Therefore, lands purchased after making a will, and before the codicil or republication, may pass by the will when republished.[2] It should be observed that between a codicil and a subsequent will, there is this difference of construction: a codicil is a republication and ratification of so much of the prior will as it does not revoke; whereas a new will, though inconsistent in part with the former will, and absolutely agreeing in part, revokes the whole prior will, by substituting a new and last disposition for the former one.[3]

[1] Haven v. Foster, 14 Pick. 534; Brimmer v. Sohier, 1 Cush. 118; Barker v. Bell, 16 Ala. 216; Jones v. Shewmaker, 35 Ga. 151; Harvy v. Armstrong, 14 Mo. 587.

[2] Mooers v. White, 6 Johns. Ch. 375; Miles v. Boyden, 3 Pick. 213; Haven v. Foster, 14 Pick. 543; Brownell v. DeWolf, 3 Mason, 486; Barker v. Bell, 16 Ala. 216; Luce v. Dimock, 1 Root, 82.

[3] Simmons v. Simmons, 26 Barb. 68; Haven v. Foster, 14 Pick. 534; Payne v. Payne, 18 Cal. 291; Mooers v. White, 6 Johns. Ch. 375; Duncan v. Duncan, 23 Ill. 364.

CHAPTER XV.—Of the Probate of Wills, and of their Registration.

ARTICLE I. Of the Probate of Wills.
II. Of the Registration of Wills.

ARTICLE I.

OF THE PROBATE OF WILLS.

SECTION.
557. Preliminary to the probate.
558. Jurisdiction of the probate of wills—foreign wills.
559. Mode of proof.
560. The effect of probate.

§ 557. **Preliminary to the Probate.**—A will takes effect upon the death of the testator,[1] and the devisee may at once enter upon the land devised to him. But before the will can be used in evidence, or its provisions carried into effect by the executor, it must be proved in the proper tribunal to be the last will and testament of the deceased. Of course, such proof cannot be made until after the death of the testator, since before his death the will is merely inchoate, and liable to be altered or revoked at any time.[2]

[1] Castro v. Castro, 6 Cal. 158.

[2] Provisions for the deposit and safe-keeping of wills of living persons

The death of the testator must, therefore, be established before the will can be admitted to probate. The kind and degree of proof required for this purpose will vary according to the circumstances. It is suggested by Mr. Redfield that, in a majority of cases, the thing will be of such common notoriety that nothing more will be required.[1] When a doubt arises upon the question, if the death cannot be proved by sufficient witnesses, recourse may be had to the presumptions of law. There is a presumption of law that a person who has been absent, and has not been heard from for seven years, is dead; but, in the absence of special circumstances there is no presumption of his death at any particular period during that time.[2] The party interested in showing the death at any particular time assumes the burden of proof, and is at liberty to show it by any facts or circumstances satisfactory to the court.[3]

The time fixed by law for the production of a will after the death of the testator is, ordinarily, governed by no fixed rule, but is left to the discretion of the court to be determined in accordance with the local statutes and the circumstances of the case.[4] If the time is so remote as to suggest special motives for delay, it should be satisfactorily accounted for upon the records. The time within which probate of a will must be made varies in the different States from three to thirty years.[5]

have been made in some of the States, but the will is not to be delivered forth except to the testator, or become of any effect, until after his death. See Stinson's Amer. Stat., § 2690.

[1] 3 Redfield on Wills, 4th ed., 1, note.

[2] The presumption of life ceases at the end of seven years from the period when he was last heard from. Whiting v. Nicholl, 46 Ill. 230.

[3] Whiting v. Nicholl, *supra*. Evidence to raise the presumption of death at any particular time within seven years, need not be direct and positive: but it should be of such a character as to make it more probable that he died at a particular time than that he survived. Hancock v. Amer. Life Ins. Co., 62 Mo. 26; Tisdale v. Conn. Mut. Life Ins. Co., 26 Iowa, 170.

[4] Woerner's Amer. Law of Administration, § 214.

[5] In Colorado, the person having possession of a will, is required to produce it for probate within ten days after the death of the testator, or

The executor is presumed to have the custody of the will, and is primarily the proper person to initiate measures for its proof. At common law no other person had a right to prove the will, until the executor had renounced the trust.[1] But in the American States, as a general rule, any person interested in the estate may cause it to be proved. And any person in possession of the will may be compelled, by citation from the proper court, to produce the same for probate, or to give testimony as to his or her knowledge of its existence or deposit. And where a will has been lost or mislaid, whether accidentally or by design, its contents may be proved and probate granted of the same, within such restrictions as the law prescribes, or the court may deem proper and satisfactory.[2]

§ 558. **Jurisdiction of the Probate of Wills—Foreign Wills.**—The jurisdiction of the probate of wills is, primarily, exclusive in the probate court, or court having probate jurisdiction, in the county or district in which the testator is domiciled at the time of his death. Says Mr. Redfield: "This general rule is of such universal acceptance in all

as soon thereafter as the decease of such testator shall come to his knowledge. Laws 1877, § 2797. In Connecticut, it is provided that no will shall be proved after ten years from the death of the testator: but any minor shall be allowed, three years after becoming of age to cause the same to be proved. Gen. Stat., 1875, p. 371, § 11. In Main, Oregon and Tennessee, the limitation for probating wills is twenty years. Maine, Rev. Stat., 1883, ch. 64, § 1. Tennessee, Townsend v. Townsend, 4 Coldw. 70. Ohio, four years. Rev. Stat. 1880, § 5943. And see Carpenter v. Denoon, 29 Ohio St. 379. Kentucky, thirty years. Hunt v. Hamilton 9 Dana, 9. Indiana, three years. Rev. Stat. 1881, § 2575. New York, four years, 3 Jarm. 729. Will devising lands may be admitted to probate at any time after the death of testator in absence of a statutory limitation. Haddock v. Boston & M. R. R. 146 Mass. 155; Rebhan v. Mueller, 114 Ill. 343.

[1] Williams on Ex., 6th Am. ed., 355. A person, not being an executor, named in the will, cannot propound it, until he has shown that he has an interest in the same by filing his own affidavit thereof, or by some other evidence. Finch v. Finch, 14 Ga. 362.

[2] Redfield on Wills, 4th ed., 15, 703; Keams v. Keams, 4 Harr. (Del.) 83; Graham v. O'Fallon, 3 Mo. 507; Kitchens v. Kitchens, 39 Ga. 168; Matter of Johnson's Will, 40 Conn. 587; Morris v. Swaney, 7 Heisk. 591.

the American States, as scarcely to require any authority in its confirmation."[1] It is no less true, that a will of real estate must be executed and proved in accordance with the law of the place where the land is situated.[2] Though, in some of the States, it is provided that a will, executed and proved in accordance with the law of the place in which the same was made, or in which the testator was at the time of his death, may be admitted to probate, and will be valid and effectual.[3] It is usually required that a foreign will shall be probated both in the home jurisdiction and in the place where the land is situated. A copy of the will and of the probate thereof is filed in the latter jurisdiction, and, when allowed, has the same effect as a will originally probated there.[4] In some of the States, when a will has been duly probated in the place of the testator's domicile, a copy of such will and of the probate thereof,

[1] 3 Redfield on Wills, 4th ed., 20.

[2] Lockwood v. Lockwood, 2 N. Y. Supp. 224.

[3] California, Civil Procedure, § 1324; Colorado, Laws, 1877, § 2814; Kansas, Comp. Laws, 1879, p. 1003, § 25; Massachusetts, Gen. Stat., p. 478, § 21; Michigan, Comp. Laws, 1871, p. 1375, § 21; Nebraska, Brown's Comp. Stat., 1881, p. 229, § 144; New Jersey, copy of will duly certified may be used in evidence, Rev. 1877, p. 1250, §§ 36, 37; Utah, Comp. Laws, 1876, p. 286, § 26.

[4] Arkansas, Dig. of Stat., § 6513; California, Civil Procedure, §§ 1322, 1323, 1324; Colorado, Laws, 1883, § 3507; Dakota, Laws, 1862, §§ 22, 25; Indiana, Stat., 1881, §§ 2591, 2593; Iowa, Rev. Code, 1880, § 2353; Vance v. Anderson, 39 Iowa, 426; Kentucky, Gen. Stat., 1879, p. 838, § 30; Maine, Rev. Stat., 1883, p. 508, § 13; Maryland, foreign will subject to be contested until probated in this State, Rev. Code, 1878, p. 424, § 29; Massachusetts, Gen. Stat., p. 749, § 151; Michigan, Ann. Stat., § 5805; Minnesota, Stat., 1878, p. 569, § 18; Mississippi, Rev. Code, 1880, § 1976; 36 Miss. 150; Nebraska, Comp. Stat., 1881, §§ 145-147; Nevada, Comp. Laws, 1873, §§ 507-509; North Carolina, Code, 1883, §§ 2156, 2157; Pennsylvania, Brightley's Purd. Dig., vol. 1, p. 404, § 7; Rhode Island, Gen. Stat., ch. 172, §§ 6-10; South Carolina, Rev. Stat., 1881, § 1751; Tennessee, Code, 1871, §§ 2182-2190; Utah, Comp. Laws, 1876, p. 286, §§ 26-28; Vermont, Rev. Laws, 1880, §§ 2057, 2058; Virginia, Code, 1887, § 2536. In a few of the States, it seems not to be requisite that the will shall have been first proved in the jurisdiction in which the testator died. Connecticut, Gen. Stat., 1875, p. 370, § 10; Delaware, Laws, 1874, p. 539, § 1; Illinois, Rev. Stat., 1880, p. 1110, § 10.

duly certified, may be recorded in the county in which the land is situated, and such record has the effect of a probate in the latter jurisdiction.[1]

The manner of certifying copies of records to be used in another State is regulated by act of Congress, which reads as follows:

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the Governor or Secretary of State, the Chancellor or keeper of the great seal of the State, or Territory, or Country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, or, if given by such Governor, Secretary, Chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Country

[1] Alabama, Dickey v. Vann, 81 Ala. 425; Delaware, Laws, 1874, ch. 84, § 6; Florida, Laws, 1881, p. 987, §§ 8, 9; Georgia, Code, 1882, §§ 2433, 2434; Illinois, Rev. Stat., 1885, p. 2471, § 9; [in Illinois, a will executed in another State, and which has been proved there, is admissible in the courts without having been admitted to probate in Illinois provided the record of the probate proceedings is authenticated in conformity with the act of Congress, Neuman v. Willetts, 5 Ill. 98]; Kansas, Comp. Laws, 1879, p. 1003, § 24; Missouri, Rev. Stat., 1879, § 3993; New York, Rev. Stat., vol. 3, p. 59, § 14; Ohio, Rev. Stat., 1880, § 5938; Oregon, Code, 1887, § 3083; Tennessee, a copy so authenticated and recorded may be used in evidence, Code, 1884, § 3024; Texas, on filing a copy as above, letters of administration shall be granted, Rev. Stat., 1888, § 1856; Wisconsin, Rev. Stat., 1878, § 2295. See *Infra*, Art. II.

aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State, Territory, or Country, as aforesaid, from which they are taken." [1]

§ 559. **The Mode of Proof.**—There are two ways of proving wills at common law, namely: in common form and in solemn form, or *per testes*. The former is where the executor presents it before the court, and in the absence and without citing the parties, produces the evidence to prove its execution. The latter includes those cases in which a contest is anticipated, when the widow and next-of-kin must be cited to be present at the probation of the will.[2] And this is the division of causes for the proof of wills made by the statute of Georgia.[3] But in this country the two classes are more commonly called contested and non-contested cases.[4] In some of the States the proceedings are the same in either case. It is usually required that the parties in interest shall be notified, either personally or by the publication of a general notice,[5] and that one or more of the witnesses shall appear and testify to the due execution of the will. If the witnesses are not attainable, the will may, in general, be established by proof of the handwriting of the testator and of the witnesses. And ancient wills have been established by proof of the handwriting of the testator alone.[6] But before such evidence is admissible, it must be shown that diligent search has been made for the witnesses, or their absence must be accounted for.[7] In some of the States, provision is made for taking

[1] Rev. Stat. United States, 2d ed., 1878, § 906.

[2] 1 Williams on Ex. 291, 298.

[3] Code 1873, §§ 2423, 2424.

[4] 3 Redfield on Wills, 36.

[5] Estate of Cobb, 49 Cal. 600. A will, ordered to probate without citation to the next of kin, resident within the State, or to their guardians, they being minors, is erroneous. Lees v. Brownings, 15 Ala. 495; Stapleton v. Stapleton, 21 Ala. 587.

[6] Duncan v. Beard, 2 Nott & McC. 400.

[7] Miller v. Miller, 2 Bing. (N. C.) 76.

the deposition of witnesses residing out of the jurisdiction of the court. No compilation of statutes has been made on this subject, for the reason that it is a matter of local practice, upon which the practitioner will require more specific information than it would be consistent with the design of the present work to undertake to give.

The facts required to be proved by the witnesses will be governed by the requisites for the execution of the instrument. As to the degree of proof required, or the ground of presuming that the requirements of the law have been complied with, and that the testator knew the contents of the instrument at the time of executing the same, no definite rule can be laid down. This is a question for the triers of the facts to determine, under all the circumstances of the particular case.[1] The burden of establishing a will is on the proponent.[2]

§ 560. **The Effect of Probate.**—The legal consequence of the exclusive jurisdiction of courts of probate in deciding on the validity of wills is, that their decrees are conclusive of the rights directly determined, and are not open to be contested in any other court, except on appeal or writ of error.[3] The finding of such court cannot be impeached

[1] Redfield on Wills, 4th ed., 41-51; Woerner's Law of Administration, §§ 217, 218; Auburn Theo. Sem. v. Calhoun, 62 Barb. 381.

[2] Riddell v. Johnson, 26 Gratt. 152; Evans v. Arnold, 52 Ga. 169; Harris v. Vanderveer, 21 N. J. Eq., 521; McGinnis v. Kempsey, 27 Mich. 363; Williams v. Robinson, 32 Vt. 568; Jamison v. Jamison, 3 Houst. 108. The burden of proof in an issue of *devisavit vel non*, to prove the validity of a will, is upon the party claiming under the will; but upon an allegation of want of capacity in the testator, it is upon the contestants. Puryear v. Reese, 6 Coldw. 21. And see McKinley v. Lamb, 56 Barb. 284; Garvin v. Williams, 44 Mo. 465. But held, under the statute of Minnesota that the burden of proof to establish the sanity of testator is upon the proponent. Layman's Will, 42 N. W. Rep. 286. The proponents of a will hold the affirmative and must establish its due execution. If, however, the attestation clause is full, and the signatures genuine, and there are circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with. Matter of Kellum, 52 N. Y. 517.

[3] Osgood v. Breed, 12 Mass. 533; Parker v. Parker, 11 Cush. 519; Brown

even by showing fraud, except by a proceeding in the same court to annul or modify the same. It cannot, therefore, be shown, collaterally, that another person was appointed executor, or that the testator was insane, or that the will of which the probate was granted was forged.[1] But the rule would be otherwise, where the court granting the probate had no jurisdiction of the case.[2] Courts of equity have jurisdiction of the construction of wills after probate, under which the force and effect of a will may be limited or qualified, and in some cases the construction has been such as to render portions of the will practically inoperative.[3]

The above points and authorities are given as illustrative of the general doctrine. By reference to the statutes of the several States, it will be found that, in some States, it is provided that the probate of wills of real estate shall be conclusive after the lapse of a certain number of years, but in the meantime be open to consideration. In other States, the probate is *prima facie* evidence of the due execution of the will, but is not conclusive, and may be litigated whenever rights to real estate claimed under the will are litigated.

v. Wood, 17 Mass. 68, 72; Dublin v. Chadbourn, 16 Mass. 433; Tompkins v. Tompkins, 1 Story, 547; Poplin v. Hawke, 8 N. H. 124; Fortune v. Buck, 23 Conn. 1; Sneed v. Ewing, 5 J. J. Marsh. 460; Dilworth v. Rice, 48 Mo. 124; Hall v. Hall, 47 Ala. 290. The probate of a will while it settles the question of due execution, does not establish its validity or determine its force and effect upon titles to real estate claimed under it. Ware v. Wisner, 4 McCrary C. C. 66.

[1] Dublin v. Chadbourn, 16 Mass. 433. So, the decree of the court of probate, duly approving and allowing the will of a married woman, unappealed from and unreversed, is final and conclusive upon the heirs-at-law of the testatrix, and they cannot in a court of common law deny the legal capacity of the testatrix to make such will. Parker v. Parker, 11 Cush. 525.

[2] Crosby v. Leavitt, 4 Allen, 410; Holyoke v. Haskins, 5 Pick. 20; Sumner v. Parker, 7 Mass. 79; Smith v. Rice, 11 Mass. 507; Sigourney v. Sibley, 21 Pick. 101.

[3] Redfield on Wills, 4th ed., 56-65; 1 Williams on Exrs., 6th Am. ed., 616-638.

ARTICLE II.

OF THE REGISTRATION OF WILLS.

SECTION.

563. Will and proof to be recorded in the office of probate.
564. Certified copies may be used in evidence, or recorded in other counties.
565. Foreign wills probated and recorded as other wills.
566. Where wills are to be recorded in registry of deeds.

§ 563. **Will and Proof to be Recorded in the Office of Probate.**—In nearly all of the States, it is provided that, when a will has been admitted to probate, it must be recorded in the office of the probate judge, or clerk of the court having probate jurisdiction, together with the proof of such will and the certificate admitting it to probate, and that the original shall be filed and preserved in that office.[1] In a few of the States, the statutes seem to contemplate that a will shall be filed and remain among the records of such court, and that no further record shall be made of it, except such as may be made upon the docket, relative to its probate.[2]

[1] Alabama, Code, 1876, §§ 2169, 2310; Arkansas, Dig. of Stat., 1874, §§ 5781, 5797; California, Civil Procedure, § 1318; Colorado, Stat., 1883, § 230; Delaware, Laws, 1874, p. 539, § 1; Florida, Bush's Dig., p. 53, § 15; Georgia, Code, 1873, § 2432; Illinois, Stat., 1883, ch. 30, § 33; Indiana, Stat., 1876, vol. 2, § 30; Iowa, Rev. Code, 1880, § 2342; Kansas, Comp. Laws' 1879, p. 1002, § 16; Kentucky, Gen. Stat., 1879, p. 837, § 26; Maryland, Rev. Code, 1878, p. 424, § 29; Massachusetts, Gen. Stat., p. 576, § 21; Michigan, Comp. Laws, 1871, p. 1378, §§ 37, 38; Minnesota, Stat., 1878, ch. 47, § 35; Mississippi, Rev. Code, 1880, § 1975; Missouri, Rev. Stat., 1879; § 3988; Nebraska, Comp. Stat., 1881, pt. 1, ch. 73, § 22; New Hampshire, Gen. Stat., p. 359, § 1; New Jersey, Rev. Stat., 1877, p. 221, § 9; New York, Rev. Stat., p. 59, § 12; Ohio, Rev. Stat., 1880, vol. 2, § 5930; Rhode Island, Gen. Stat., 1872, p. 376, § 4; Tennessee, Stat., 1871, § 2169; Texas, Rev. Stat., 1879, art. 4876; Virginia, Code, 1873, p. 916, § 37; West Virginia, Rev. Stat., 1879, vol. 2, ch. 201, § 30.

[2] See Connecticut, Gen. Stat., 1875, p. 369, § 2; Maine, Rev. Stat., 1871, p. 565, § 15; North Carolina, Battle's Rev., 1873, p. 853, § 38.

§ 564. **Certified Copies may be Used in Evidence, or Recorded in other Counties.**—It is usually provided that a will duly proved, recorded, certified by the judge or clerk, and attested by the seal of the court, or a copy of the record of such will properly authenticated, may be read in evidence without further proof.[1] And where lands conveyed by will are situated in different counties, a copy of the will should be recorded, in each county. In some of the States, the will is to be recorded, in such case, in the probate office,[2] while in others it is recorded in the registry of deeds.[3]

§ 565. **Foreign Wills.**—We have already seen that wills, executed and proved in any other State or Territory, are usually required to be probated in the county in which the land is situated, and are to be recorded in the same manner as other wills. In some of the States, however, a will so proved and certified, as required by act of Congress, may be recorded and becomes effective without further proof.[4]

§ 566. **Where Wills are to be Recorded in the Registry of Deeds.**—In some of the States, a will conveying real estate is required to be recorded, not only in the office of probate, but a copy thereof, together with the proof and certificate of probate, duly authenticated by the proper certificate of the officer, must also be recorded in the office

[1] Alabama, Code, 1876, § 2312; Arkansas, Dig. Stat., 1874, §§ 5782, 5798; Delaware, Laws, 1874, p. 539, § 1; Florida, Bush's Dig., p. 53, § 15; Georgia, Code, 1873, § 2432; Illinois, Rev. Stat., 1880, p. 1111, § 18; Indiana, Stat., 1876, vol. 2, § 32; Kansas, Comp. Laws, 1879, p. 1002, § 16; Michigan, Laws, 1871, p. 1378, § 38; Mississippi, Code, 1880, § 1975; Missouri, Rev. Stat., 1879, § 3990; Ohio, Rev. Stat., 1880, § 5931. The foregoing statutes are cited as illustrative of the text, rather than as comprising all the States in which this is the law.

[2] Kansas, Comp. Laws, 1879, p. 1002, § 18; Ohio, Rev. Stat., 1880, § 5932; Texas, Rev. Stat., 1879, art. 4876.

[3] Minnesota, Stat. at Large, 1873, p. 650, § 35; Missouri, Rev. Stat., 1879, § 3991; Vermont, Rev. Laws, 1880, § 2048; Wisconsin, Rev. Stat., 1878, § 2296.

[4] *Ante*, § 558.

of the recorder of deeds.[1] In Wisconsin, it seems to be contemplated that a will of real estate shall be recorded in the registry of deeds, and not elsewhere.[2]

[1] Minnesota, Stat. at Large, 1873, p. 650, § 35; Missouri, Rev. Stat., 1879, § 3991; Vermont, Rev. St. Laws, 1880, § 2048.

[2] Rev. Stat., 1878, § 2296.

CHAPTER XVI.—Of the Construction of Wills.

ARTICLE I. General Rules of Construction.
II. Construction as to Devisees.
III. As to the Property and Estate Devised.
IV. Of a Power to Sell Land.

ARTICLE I.

GENERAL RULES OF CONSTRUCTION.

SECTION.
569. Extent of the present chapter.
570. The intention of the testator the object of all construction.
571. Jarman's rules for the construction of wills.

§ 569. **Extent of the Present Chapter.**—Says Chancellor KENT: "Though we are not to disregard the authority of decisions, even as to the interpretation of wills, yet it is certain that the construction of them is so much governed by the language, arrangement and circumstances of each particular instrument, which is usually very unskillfully and very incoherently drawn, that adjudged cases become of less authority, and are of more hazardous application, than decisions upon any other branch of the law."[1] Such being the case, we shall not attempt more in this chapter than to state a few leading principles, which have been established

[1] 4 Kent's Com. 534.

and applied to the construction of wills, without referring to any considerable number of adjudicated cases. On these subjects the reader is recommended to consult works which treat more especially of wills.

§ 570. **The Intention of the Testator the Object of all Construction.**—The primary rule in the construction of a will, whether of real or personal property, is, that the intention of the testator, if not inconsistent with the rules of law, must govern.[1] It is for the purpose of ascertaining what the intention of the testator was, that rules of construction are to be resorted to. These propositions are supported by all of the adjudged cases and text writers upon the subject, and are too familiar to require any considerable number of citations of authority.[2] But this rule, like all general rules, is subject to some qualifications.[3] In a case in the New York Court of Appeals, STRONG, J., states the rules applicable to the construction of wills as follows:

"The intentions of the testator shall prevail, if they are consistent with each other and conformable to the principles of law.

"The language used shall receive its ordinary interpretation, except where some other is necessarily or clearly indicated.

"Where words are equivocal, that explanation shall be given which will preserve consistency, in preference to one which would create inconsistency.

"If possible, some effect shall be given to each distinct provision rather than that it should be annihilated.

[1] The construction of words in a will is much less technical than that of the same words in a deed. In a deed, the words govern the intention; in a will, the intention governs the words. Edwards v. Bibb, 43 Ala. 666; Butler v. Huestis, 68 Ill. 594.

[2] 1 Redfield on Wills, 4th ed., 433; 4 Kent's Com. 534; Bradhurst v. Bradhurst, 1 Paige, 331; Covenhoven v. Shuler, 2 Paige, 122; Rathbone v. Dyckman, 3 Paige, 9; Crosby v. Wendell, 6 Paige, 549; Brooks v. Evetts, 33 Tex. 732; Reed v. Hargroves, 40 Ga. 18. The plain intent of the testator should govern, without regard to the technical rules. Meade v. Jennings, 46 Mo. 91.

[3] 1 Redfield on Wills, 433. And see Bell v. Humphrey, 8 W. Va. 1.

"Where at first a special, and subsequently a general term is used, plainly having reference to the same matter, the latter should be limited to the former; and,

"Where, after the application of liberal principles of interpretation, there is yet a palpable contradiction between two directions as to the same matter, the latter should prevail."[1]

§ 571. **The General Rules for the Construction of Wills, propounded by Mr. Jarman,**[2] have acquired the weight of authority both in England and America, and we can, perhaps, render no greater service to the reader in this connection than to repeat them.

1. "That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of the State in which the property is situated.[3]

2. "That technical words are not necessary to give effect to any species of disposition in a will.

3. "That the construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject;[4] though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case, and not in the other.

4. "That a will speaks, for some purpose, from the period of execution, and for others from the death of the testator; but never operates until the latter period.

5. "That the heir is not to be disinherited without an express devise or necessary implication; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed.[5]

[1] Crystie v. Phyfe, 19 N. Y. 348.

[2] 3 Jarman on Wills, 5th Amer. ed., p. 703, *et seq.*

[3] Jennings v. Jennings, 21 Ohio St. 56.

[4] A court of chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law. Nevins v. Gourley, 95 Ill. 206.

[5] Howard v. Amer. Soc., 49 Me. 288; Irwin v. Zane, 15 W. Va. 646; Hitchcock v. Hitchcock, 35 Pa. St. 393; Gelston v. Shields, 78 N. Y. 275; Graydon v. Graydon, 25 N. J. Eq. 561; Rupp v. Eberly, 79 Pa. St. 141.

6. "That merely negative words are not sufficient to exclude the title of the heir or next kin. There must be an actual gift to some other definite object.[1]

7. "That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole.[2]

8. "That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will,[3] though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity,[4] arising from words equally descriptive of two or more subjects or objects of gift.

9. "Nor to vary the meaning of words; and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible;[5] but

10. "The court will look at the circumstances under which the devisor makes his will—as the state of his property, of his family, and the like.[6]

[1] Matter of Rover, 7 Phil. 524.

[2] Jackson v. Hoover, 26 Ind. 511; Nimmons v. Westfall, 33 Ohio St. 213; Lane v. Vick, 3 How. 464; Banks v. Jones, 60 Ala. 605; Mutter's Est., 38 Pa. St. 314; Shriener's Appeal, 53 *Id.* 106; Moran v. Dillehay, 8 Bush, 434; Welsch v. Belleville Savings Bank, 94 Ill. 191.

[3] Stanard v. Barnum, 51 Md. 440; Gilliam v. Chancellor, 43 Miss. 437; Caldwell v. Caldwell, 7 Bush, 515; Hill v. Felton, 47 Ga. 455.

[4] Tuxbury v. French, 41 Mich. 7; Black v. Hill, 32 Ohio St. 313; Dunham v. Averill, 45 Conn. 61; Woodruff v. Migeon, 46 *Id.* 236; Gillespie v. Schuman, 62 Ga. 252. Extrinsic parol evidence is admissible to show that the omission of a child by the testator was intentional. Peters v. Siders, 126 Mass. 135.

[5] If the wording of a will is ambiguous, it is the duty of the court to put that construction upon the words which seems best to carry the intention into effect. But if there is no ambiguity, however unfortunate it may be that the intention of the testator should fail, there is no right in any court to say that those words should not have their plain and unambiguous meaning. Van Nostrand v. Moore, 52 N. Y. 12.

[6] Travis v. Morrison, 28 Ala. 494; Rewalt v. Ulrich, 23 Pa. St. 388; Smith v. Bell, 6 Pet. 68; Bond's Appeal, 31 Conn. 183; Lines v. Darden, 5 Fla. 51; Goodhue v. Clark, 37 N. H. 525; Gilliam v. Chancellor, 43 Miss. 437. But where the intention is clear, his situation or that of his

11. "That, in general, implication is admissible only in the absence of, and not to control, an express disposition.[1]

12. "That an express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by an inference and argument from other parts of the will;[2] and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents;[3] though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt.

13. "That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences of his disposition, a reason for varying it: but where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose.

14. "That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and, therefore, the court in one instance adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void.

15. "That favor or disfavor to the object ought not to influence the construction.

16. "That words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained;[4] and they are, in all cases, to receive a con-

family or property will not be considered. Brearley v. Brearley, 9 N. J. Eq. 21; Williamson v. Williamson, 1 Jones (N. C.) Eq. 281.

[1] Elder v. Lantz, 49 Md. 186; Wetter v. Walker, 62 Ga. 142.

[2] Ward v. Amory, 1 Curt. 419. And see Orrick v. Boehm, 49 Md. 72.

[3] Where there is in the first place an unambiguous and certain description of the thing, and afterwards another description which fails in certainty, the latter must be rejected. Jones v. Robinson, 78 N. C. 396.

[4] Vanneson v. Culbertson, 10 Serg. & R. 150; Roosevelt v. Thurman,

struction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.[1]

17. "That, where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.[2]

18. "That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject. And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning.[4]

19. "That words and limitations may be transposed,[5] supplied,[6] or rejected where warranted by the immediate context or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.[7]

20. "That words, which it is obvious are miswritten (as

1 Johns. Ch., 220; Ketaltas v. Ketaltas, 72 N. Y. 312; Pruden v. Paxton 79 N. C. 446; Kelly v. Reynolds, 39 Mich. 464; Carter v. Reddish, 32 Ohio St. 1; Castner's Appeal, 88 Pa. St. 478.

[1] Elder v. Lantz, 49 Md. 199; Jones v. Williams, 41 Mich. 552; Banks v. Jones, 60 Ala. 605.

[2] Hawley v. Northampton, 8 Mass. 3; Myers v. Eddy, 47 Barb. 263; Clark v. Mosely, 1 Rich. (S. C.) Eq. 396; Clark v. Smith, 49 Md. 106; France's Estate, 75 Pa. St. 220.

[3] Tucker v. Ball, 1 Barb. 94; Eliot v. Carter, 12 Pick. 436.

[4] Carpenter v. Boulden, 48 Md. 122; Thompson's Appeal, 89 Pa. St. 36; Wright's Appeal, *Id.* 67; Moore v. Hegeman, 72 N. Y. 376.

[5] A transposition of the language of a will can be made only when necessary to give effect to some purpose of the testator, which clearly appears. Latham v. Latham, 30 Iowa, 294.

[6] Simpson v. Smith, 1 Sneed (Tenn.), 394. See Kellogg v. Mix, 37 Conn. 243; Butterfield v. Hamant, 105 Mass. 338.

[7] Grimes v. Harmon, 35 Ind. 198. There is no power to change the words in a will, unless such change is necessary to effect the intent of the testator, apparent either on the face of the will or from surrounding circumstances. Ely v. Ely, 20 N. J. Eq. 43.

dying with issue, for dying without issue) may be corrected.[1]

21. "That the construction is not to be varied by events subsequent to the execution,[2] but the courts, in determining the meaning of particular expressions, will look to possible circumstances in which they *might* have been called upon to affix a significance to them.

22. "That several independent devises, not grammatically connected or united by the expression of a common purpose, must be construed separately and without relation to each other; although it may be conjectured, from similarity of relationship or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them.

23. "That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.[3]

24. "That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary;[4] and accordingly a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction."

ARTICLE II.

CONSTRUCTION AS TO DEVISEES.

SECTION.

574. Misnomer and misdescription.
575. Who are entitled under the description.
576. Taking *per stirpes* or *per capita*.
577. Lapsed devises.

[1] Emmert v. Hays, 89 Ill. 11; State v. Joyce, 48 Ind. 310.
[2] Miller v. Adkinson, 32 Ind. 433.
[3] Oxley v. Lane, 35 N. Y. 340.
[4] Burnet v. Burnet, 30 N. J. Eq. 595.

§ 574. **Misnomer and Misdescription.**—The general rule is, that devisees and legatees must answer the description and character given to them in the will.[1] But the rule is subject to important qualifications and exceptions. One of almost equal generality with the rule is, that a misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision or defeat the intention of the testator, if, either from the will itself, or evidence *dehors* the will, the object of the testator's bounty can be ascertained.[2] When the name used in a will does not designate with precision any person, and when the circumstances concur to indicate that a particular person was intended, and no similar conclusive circumstances appear to distinguish any other person, the person thus shown to be intended will take.[3]. And if the language of the will be so ambiguous and obscure as to leave a doubt as to the identity of the person for whom the benefit was intended, recourse may be had to parol evidence and the situation of the testator's family, and other circumstances may be shown, to enable the court to ascertain the legatees or devisees intended.[4] The extent to which parol evidence is admissible in explanation of the intention of a testator is a question upon which the authorities are numerous and somewhat conflicting. The general rule of evidence is, that latent ambiguities may be explained by parol; but such evidence is inadmissible to vary or contradict the terms of a written instrument. The tendency has been to greater lib-

[1] 2 Williams on Exrs., 6th Am. ed., 1170; 1 Powell on Dev., 309; Hodgson v. Ambrose, 1 Doug. 344; Stith v. Barnes, 1 Law. Rep. (N. C.) 484; Judy v. Williams, 2 Ind. 449.

[2] A corporation may be known by several names as well as an individual. Lefevre v. Lefevre, 59 N. Y. 434, 440. And see Minot v. Curtis, 7 Mass. 441; Dunham v. Averill, 45 Conn. 61; Christy v. Badger (Iowa), 34 N. W. Rep. 427.

[3] Howard v. American, etc. Society, 49 Me. 288.

[4] Garner v. Heyer, 2 Paige, 11; Beachcroft v. Beachcroft, 1 Md. 430. A nickname, or a name by reputation given by the testator and current in his family and neighborhood, is sufficient to designate the devisee. Ryers v. Wheeler, 22 Wend. 150.

erality in the construction of wills than is permissible in case of any other instrument; but this cannot be extended so far as to add a new provision to a will. For example, if the name is omitted and the will is blank, the omission cannot be supplied by the court upon any evidence of the intention of the testator.[1] Or, if the name is inserted and is wholly mistaken, it cannot be corrected by striking out the name of one person and inserting that of another, although the surrounding circumstances render the identity of the person intended reasonably clear.[2]

§ 575. **Who are Entitled under the Description.**—A devise to "children" without other description, as a general rule, means the immediate legitimate descendants of the person named. And where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grandchildren, or more remote descendants.[3] If the testator, or person named, has children that come within the primary sense of the term, parol evidence cannot be received to show that a different class of persons is intended; but he having illegitimate children only, proof of circumstances *dehors* the will is admissible to show that they were the childen intended.[4] So it has been held that the word children may include grandchildren when there were no children in existence at the time of the making of the will; or where there could not be any children at the time of the event contemplated by the testator;

[1] Hunt v. Hort, 3 Bro. Ch. 312; Andress v. Weller, 3 N. J. Eq. 604; Creely v. Ostrander, 3 Bradf. (N. Y.) 107.

[2] Yates v. Cole, 1 Jones (N. C.) Eq., 110; 1 Redfield on Wills, 612.

[3] Cromer v. Pinckney, 3 Barb. Ch. 475; Hopson v. Commonwealth, 7 Bush, 644; Feit v. Vanatta, 21 N. J. Eq. 84; Thompson v. Ludington, 104 Mass. 193. As to meaning of the term "children," see Wharton v. Silliman, 22 La. Ann. 343. The word "children" in a will should not be construed as synonymous with "heirs" when it would conflict with testator's intention. Akers v. Akers, 23 N. J. Eq. 26. An immediate gift to "children," without additional description, means a gift to the children in existence at the death of the testator. Shotts v. Poe, 47 Md. 413.

[4] Gardner v. Heyer, 2 Paige, 11.

or where the testator has clearly shown by the use of other words that he used the term children as synonymous with issue or descendants.[1] The same rules apply to the construction of the words nephews and nieces, cousins and the like. They are to be taken in their primary and ordinary sense, unless a contrary intention appears from the context of the will.[2]

The words "heirs," "issue," and like expressions may be used either as words of limitation or words of purchase. By words of limitation must be understood, that the interest limited is originally given to the ancestor, so as to create in him an estate or interest of inheritance, descendible to his heirs of the given description. By words of purchase is meant such words as give the estate limited to the heirs or issue, in their own right, and as the persons answering the description.

We have seen that, under the rule in *Shelley's Case*, when the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance there is a limitation mediate or immediate to his "heirs," or "heirs of his body," the word heirs is to be construed as a word of limitation, and not of purchase.[3] But wherever it is certain that the word "heirs" is used as descriptive of the devisees, and with the intention that such persons shall take as purchasers, it will receive that construction.[4] When so used, and there is no context to explain it otherwise, the word "heir" is to be taken in its natural and ordinary

[1] Mowatt v. Carow, 7 Paige, 328; Morrill v. Phillips, 142 Mass. 240; *Re* Paton, 41 Hun (N. Y.), 497; Henderson v. Henderson, 64 Md. 185.

[2] Cromer v. Pinckney, 3 Barb. Ch. 475; Green's Appeal, 42 Pa. St. 25.

[3] *Ante*, § 115. It is to be remembered that in some of the States this rule has been abolished.

[4] Doe v. Jackman, 5 Ind. 283; Morton v. Barrett, 22 Me. 257. In a testamentary paper, the word "heirs" may be construed "children," where such is the evident intention of the testator. Shepherd v. Nabors, 6 Ala. 631; Eby v. Eby, 5 Pa. St. 461; King v. Beck, 15 Ohio, 559; Thomas v. White, 3 Litt. (Ky.) 177. See Bailey v. Patterson, 3 Rich. (S. C.) Eq. 156; Williamson v. Williamson, 18 B. Mon. 329; Love v. Buchanan, 40 Miss. 758; Bowers v. Porter, 4 Pick. 198; Ellis v. Essex Merrimack Bridge, 2 Pick. 243; Bryant v. Derberry, 2 Hayw. (N. C.) 356; McCartney v. Osburn, 118 Ill. 403.

meaning, and will include those persons who are entitled under the statute of distribution.[1] The words "next of kin," "relatives," "family," etc., are construed in the same way,[2] and may be enlarged or controlled by the context.[3]

§ 576. **Taking per Stirpes or per Capita.**—Where a devise is made to "heirs," "next of kin," or by any term which is construed to mean the persons entitled under the statute of distributions, according to the English rule, which has been adopted in several of the American States, the persons thus designated take *per capita* and not *per stirpes*.[4] The rule, more clearly stated, is, that persons described as a class take in the same way as if each individual comprised in the class were called by his proper name. "But," says Mr. Jarman, "this mode of construction will yield to a very faint glimpse of a different intention in the context.[5] And therefore, if the declared general purpose of the will would be defeated by applying this rule, the other rule of dividing *per stripes* will be adopted.[6] In some of the States the latter rule has been recognized, and it has been held that when a testator gives to his next of kin in classes, leaving the proportions doubtful, the classes take *per stripes*, and not *per capita*.[7]

[1] Mounsey v. Blamire, 4 Russell, 384.

[2] Where a bequest is to "relatives," the next of kin, according to the statute of distributions, are entitled to it, there being nothing in the will to the contrary. Drew v. Wakefield, 54 Me. 291; Varrell v. Wendell, 20 N. H. 431.

[3] Where the testator described and specified certain of his "nearest" relatives, the description was applied independently of the statute. Ennis v. Pentz, 3 Bradf. (N. Y.) 382.

[4] Ward v. Stow, 2 Dev. (N. C.) Eq. 509; Weston v. Foster, 7 Met. 297; Burnet v. Burnet, 30 N. J. Eq. 595; Hill v. Bowers, 120 Mass. 135; Collins v. Hoxie, 9 Paige, 81; Myers v. Myers, 23 How. Pr. 410; Seabury v. Brewer, 53 Barb. 662.

[5] 2 Jarman on Wills, 1st Am. ed., 111.

[6] Bivens v. Phifer, 2 Jones (N. C.) L. 436; Roper v. Roper, 5 Jones (N. C.) Eq., 16; Howell v. Tyler, 91 N. C. 207; Stoutenburgh v. Moore, 17 Cent. L. J. 312, with note.

[7] Fissel's Appeal, 27 Pa. St. 55; Winter's Appeal, 40 Pa. St. 111; Harris' Estate, 74 Pa. St. 452; Reymond v. Hillhouse, 45 Conn. 467; Talcott

§ 577. **Lapsed Devises.**—At common law, when the person to whom the testator gives land dies before the testator, the devise would lapse; but in most of the States, if a devise is made to a son or grandson of the testator, it takes effect, by force of the statute, in favor of the heirs of the devisee, if he die before the testator.[1] And where a devise fails by lapsing, it does not go to the residuary devisee, but to the heir at law of the testator. Though, where the devise is void *ab initio*, as where the devisee is by law incapable of taking the devise, some of the cases hold that it falls within the residuum and passes to the residuary devisee. The cases are somewhat numerous under this head and more or less conflicting; consequently no attempt, has been made at collecting them. It is stated by Mr. Washburn that the weight of American authority is in favor of such devises going to the testator's heirs.[2]

ARTICLE III.

AS TO THE ESTATE AND PROPERTY DEVISED.

SECTION.

580. What general words carry real estate.
581. The estate or interest which passes.
582. Description of the property devised.

§ 580. **What General Words carry Real Estate.**—The usual and proper words necessary to create a devise are "give and devise." But any other words, which sufficiently

v. Talcott, 39 Conn. 186; Kelly v. Vigas, 112 Ill. 242; *s. c.*, 54 Amer. Rep. 235.

[1] Moore v. Dimond, 5 R. I. 121; Sheets v. Grubbs, 4 Metc. (Ky.) 340; Billingsly v. Harris, 17 Ala. 214; Hamlet v. Johnson, 26 Ala. 557; Colt v. Colt, 33 Conn. 270.

[2] 3 Washb. Real Prop., 4th ed., 524.

show the intention of the testator to dispose of his lands or any part thereof, will be sufficient for that purpose. The question whether real estate passes under a devise can only arise where the testator has used words not properly and technically descriptive of such property, or where, though using terms properly applicable thereto, he has created doubts by their position or improper use in other parts of the will. When used in connection with words descriptive of personal property, general expressions may be limited by the particular description. The word "estate" is sufficiently comprehensive to embrace every description of property; but it may apply to either real or personal estate according to the manner of its use in the will, or in the different clauses thereof, or it may be descriptive of the quantum of interest devised.[1] But a devise of the testator's "estate" generally, passes both real and personal estate.[2] So the word "property" is broad enough to include everything which may be the subject of ownership when used in a general sense,[3] or may be restrained by the context to any particular class of property.[4]

§ 581. **The Estate or Interest which Passes.**—Formerly, in wills of real estate, if the devise contained no words of limitation or of perpetuity, the devisee took only a life estate. But this rule has been changed by statute in most of the States, so that the word "heirs" is no longer necessary to convey a fee in land.[5] And in order to carry out the intention of the testator, courts will seize upon any general expression of a grant as affording evidence that a fee was intended. Thus the words "estate," "property," "land,"

[1] Stump v. Deneale, 2 Cranch C. C. 640; Den v. Snitcher, 14 N. J. L. 53; Den v. Drew, *Id.* 68; McAlister v. Gilmore, 1 Ired. (N. C.) Eq. 22.

[2] Blewer v. Brightman, 4 McCord (S. C.), 60; Tarbell v. Tarbell, 2 Yates (Pa.), 187; Jackson v. Delancey, 11 Johns. (N. Y.) 365; Andrews v. Brumfield, 32 Miss. 107.

[3] Pell v. Ball, Spears (S. C.) Ch. 48; Morris v. Henderson, 37 Miss. 492; Ressetter v. Simmons, 6 Serg. & R. (Pa.) 452.

[4] Wheeler v. Dunlap, 13 B. Mon. (Ky.) 291; Pippin v. Ellison, 12 Ired. 61. See 2 Jarman on Wills, 5th Am. ed., 315.

[5] *Ante*, §§ 85, 114, 115.

"all my landed property," "all the estate called," etc., "all my estate, real, personal and mixed," and words of similar import, have been held to pass real estate in fee-simple to the devisee.[1]

Notwithstanding such words are usually construed to carry a fee, independent of words of limitation, a careful conveyancer will use the words which necessarily carry the fee-simple and which leave no room for construction; or, if a less estate is intended to be devised, will so express it as to leave no room for argument or dispute. "I give and devise to A. B., his heirs and assigns forever," are the appropriate words for a devise in fee-simple, and can easily be qualified or limited to any particular estates.

§ 582. **Description of the Property Devised.**—To the validity of every devise it is requisite that there be a definite object and definite subject-matter. The rules of construction for the identification of either are the same. A will is not to be held void for uncertainty, whenever, from the language of the will and the attendant circumstances, it can be determined what the intention of the testator was.[2] But where the will is so obscure that the court cannot discern the intention of the testator, the devise must fail.[3]

The word "house" in a will is synonymous with "messuage," and conveys all that comes within the curtilage.[4] So, under a devise of a "barn," land enough passes to complete its enjoyment, and no more.[5] Under the term "appurtenances" land will pass, if necessary to effect the intention of the testator.[6] So the term "homestead" will

[1] Williams on Exrs., 975, n; Robinson v. Randolph, 21 Fla. 629.

[2] It is only required that the court may be enabled, by fair and reasonable intendment, to ascertain the meaning. Swift v. Lee, 65 Ill. 336.

[3] 1 Jarman on Wills, 5th Am. ed., 643. "It must be an extreme case before we can relieve ourselves of the duty of giving a construction to the instrument by declaring it void for uncertainty." Hornblower, C. J., in Den v. McMurtrie, 15 N. J. L. 276.

[4] Rogers v. Smith, 4 Pa. St. 93.

[5] Bennet v. Bittle, 4 Rawle (Pa.), 339.

[6] Otis v. Smith, 9 Pick. 293; Leonard v. White, 7 Mass. 6; Elliott v. Carter, 12 Pick. 437.

pass the farm upon which the testator resided,[1] and a devise of a lot with the personal property thereon passes live stock.[2]

"The residue of" a testator's estate and effects, means what is left after all liabilities are discharged and all the purposes of the testator are carried into effect.[3] And the term "all the residue" of the testator's property, passes real as well as personal property; the real estate in fee, though no words of limitation or inheritance are added.[4]

ARTICLE IV.

OF A POWER TO SELL LANDS.

SECTION.

585. By what words a power is created.
586. Execution of power in a will.

§ 585. **By what Words a Power is Created.**—To confer a power to sell lands under a will, plain and express words to that effect are necessary, or the power must be implied by the imposition of duties on the executor which cannot be performed except by sale.[5] Words in a will, such as "with discretionary power to settle my estate as they shall judge best for the interest of my heirs at law," or "my just debts first to be paid," do not raise an implied power in an executor to sell land.[6] And when a testator made a bequest to

[1] Hopkins v. Grimes, 14 Iowa, 73; Ford v. Ford, 70 Wis. 19; *s. c.*, Amer. St. Rep. 117, with note.

[2] Martin v. Osborne, 85 Tenn. 420.

[3] Graves v. Howard, 3 Jones (N. C.) Eq. 302.

[4] Parker v. Parker, 5 Metc. (Mass.) 134; Adams v. Adams, 2 Jones (N. C.) Eq. 215; Smith v. Smith, 17 Gratt. (Va.) 268; Atkins v. Kron, 2 Ired. Eq. 58; Seekright v. Carrington, 1 Wash. (Va.) 45; Warner v. Willard, 54 Conn. 470.

[5] Skinner v. Wood, 76 N. C. 109.

[6] Owen v. Ellis, 64 Mo. 77.

his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," it was held that she took a life estate with only such power as a life tenant can have, and that her conveyance of the real property passed no greater interest.[1] In the case last cited the rule is laid down as sustained by the authorities, that where a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. Thus, a gift by a testator to his parents of "the use and improvement of all my estate itself as may be necessary for their comfortable support as long as either of them shall live" was held to be a gift of a life estate, and a power to dispose of so much of the fee as may be necessary for the purpose indicated.[2]

Where the absolute property is devised, a limitation over is void, because inconsistent with the gift, and the devisee has the right to sell.[3] But where a life estate is clearly intended, the devisee cannot take a fee under the will, though it remains undisposed of, but the estate will follow the law of descents.[4]

If a testator directs his real estate to be sold for certain purposes without stating by whom the sale shall be made, and the proceeds are distributed by the executor in the payment of debts or legacies, etc., he has the power to make the sale by implication.[5] Of course, when the will expressly directs the executor to sell, he may do so; and generally, by the aid of statutes, an administrator with the will annexed has the same power to sell lands as the executor for whom he is substituted, and in either case the sale may be made under the power conferred by the will, and

[1] Brant v. Virginia Coal and Iron Co., 93 U. S. 326.

[2] Symms v. Moulton, 120 Mass. 343.

[3] McKinzie's Appeal, 41 Conn. 607; Kelley v. Kelley, 61 N. Y. 47.

[4] Woodruff v. Cook, 61 N. Y. 638.

[5] Mandlebaum v. McDonell, 29 Mich. 78; Blount v. Moore, 54 Ala. 360; Whitehead v. Wilson, 29 N. J. Eq. 396.

no order of court will be necessary in the premises. But when the object for which a power to sell has been created, has been accomplished or has become impossible or unattainable, the power itself ceases to exist.[1]

§ 586. **Execution of Power in a Will.**—The subject of the execution of powers has been noticed in a former part of this work.[2] A few observations only will be added. In general, a will giving power of sale vests the title in the executor at the time of the testator's death, and his deed of the property, made before probate of the will, is a good conveyance provided the will be subsequently probated.[3]

The authority of an executor is derived from the will, not from the letters testamentary; the latter are but the authentic evidence of the power conferred by the will.[4] But under a statute requiring the executor to give bond before intermeddling with the estate, his power, it seems, is suspended until he has duly qualified.[5] And where by the terms of a will the testator appointed an executor, and his wife as executrix, and gave them power to sell, at private or public sale, all his property as they might deem best for the interest of his estate, it was held that the will conferred an official, and not a personal trust, and that after ceasing to be executrix, the wife had no power to alienate the property.[6] We have seen that where a conveyance is obviously made in execution of a power, a very slight reference, or even no reference, except by inference, to the power, will pass the estate to the full extent of the power.[7]

[1] Harmon v. Smith, 28 Cent. L. J., 476; Fidler v. Lash, 17 Atl. Rep. 240; Wilkinson v. Buist, 16 Atl. Rep. 856.

[2] *Ante*, §§ 152-157.

[3] Wilson v. Wilson, 54 Mo. 213.

[4] Hartnett v. Wendell, 60 N. Y. 346.

[5] Lamb v. Helm, 56 Mo. 421; Stagg v. Green, 47 Mo. 500.

[6] Littleton v. Addington, 59 Mo. 275. A power to executors to sell land cannot be exercised by one executor alone after the resignation of the others. Tarver v. Haines, 55 Ala. 503.

[7] *Ante*, § 155.

INDEX.

[The references are to pages.]

A.

ABANDONMENT,
of homestead, effect of, 172.

ABEYANCE,
of freehold, not allowed by law, 104.

ACCEPTANCE,
of deed, essential to its validity, 190.
when presumed, 199.
See DELIVERY.
of rent, when a waiver of forfeiture, 296.

ACKNOWLEDGMENT,
of deed, purpose and requisites of, 222–241.
when necessary, 223.
essential to due execution of deed by married woman, 224.
effect of, upon deed as evidence, 224.
authorizes and gives effect to record, 225.
how made by an attorney, or by a corporation, 226.
may be made before, or after delivery of the deed, 227.
will relate back, and make good an ineffectual conveyance, when, 227.
must be in accordance with law of State where land is situated, 223, 227.
with law in force at date of, 223, 227.
qualification of officer taking, 228.
how far a ministerial, and how far a judicial act, 228.
may be taken by deputy, 229.
as to date of certificate of, 230.
how far essential that the place of taking same shall appear from certificate 230.
the official character of the officer should appear from certificate, 231.
the name of grantor should be stated or referred to, 231.
to what facts the officer must certify, 231, 232.
statutory requirements must be substantially complied with, 232.
the fact of identity of party an essential part of the certificate, 234.
as to the private examination of married women, 235, 236.
seal of officer taking, to be attached to the certificate, 236.
certificate required to be on same paper as the deed, 237.
certificate how far conclusive, 238.

[The references are to pages.]

ACKNOWLEDGMENT—Continued.
mistake in certificate, how corrected, 239.
effect of fraudulent alteration of certificate, 239.
who may take advantage of defective, 239.
constitutionality of statutes designed to cure defects in, 240.
See PROOF OF DEEDS; REGISTRATION.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION,
tenant estopped to set up, against landlord, 277.

AFTER-ACQUIRED PROPERTY,
whether subject to mortgage, 398.
whether, passes by will, 544.

AGE,
at which persons may make will in the different States, 537.

AGENT. See PRINCIPAL AND AGENT.

AGREEMENT,
of parties, the first essential to a deed, 1.
for purchase and sale of land, 2, 19.
See CONTRACT.
for a deed, 19.
See DEED.
for a lease, 273, 274.
See LEASE.

ALABAMA,
deed in, not invalidated by insertion of grantee's name after delivery, 26.
covenants implied by words "grant, bargain and sell," in, 156, 157.
an instrument purporting to be sealed requires no seal in, 163.
separate acknowledgment of wife to deed of homestead required, 169.
use of seals abolished, 178.
number of witnesses required to deed in, 183.
if acknowledged, no witnesses required, 183.
competency of witnesses to deed in, 184.
record of deed constructive notice from date of filing only, 246.
the common-law doctrine of mortgages prevails, 372.
a lien exists in favor of vendors for purchase-money in, 393.
method of releasing mortgages in, 491.
age at which persons may make will of real estate, 537.
married women may dispose of their separate property by will same as if sole, 539.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
marriage and birth of child revokes will, 567.
certified copy of will duly probated and recorded, admissible in evidence, 579.
wills are required to be filed and recorded in office of probate, 580.

ALIEN,
right of, to hold land, 42.
disability of, removed by statute in most States, 42.
See CORPORATIONS.

ALIENATION,
right of, comparatively unrestricted in this country, 28.

ALTERATION,
of deed, must be made before delivery, 22.
after delivery will render deed void, or will have no effect, 22.
if fraudulent, will avoid executory contract, 22.
if unimportant or made by stranger, is of no effect, 22.
when material and made by party claiming under it, will avoid deed, 22.
may be made by consent of parties, after execution of deed, 23.

[The references are to pages.]

ALTERATION—Continued.
when so made, has the effect of a re execution of the deed, 23.
presumption as to, 23.
burden of proving, 23.
effect of, upon deed as a conveyance, 24, 25.
See CANCELLATION OF DEED.
AMBIGUITY,
latent, may be explained by parol, 8, 87.
See EVIDENCE.
APPOINTMENT. See POWERS.
APPORTIONMENT. See LEASE; MORTGAGE.
APPURTENANT.
everything that is, passes by grant of the principal, 89, 90.
ARIZONA,
separate acknowledgment of wife to deed of homestead required in, 169.
method of relinquishing mortgages in, 491.
age at which persons may make will of real estate, 537.
married women may dispose of separate property by will same as if sole, 539.
ARKANSAS,
covenants implied by words "grant, bargain and sell" in, 156, 157.
a scroll may be used as a seal in, 179.
record of deed constructive notice from date of filing only, 246.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 380.
a lien exists in favor of vendors for purchase-money in, 393.
method of releasing mortgages in, 491.
age at which persons may make will of real estate, 537.
married women may devise and bequeath the same as if sole, 539.
devises to witnesses to will in, when void, 541.
number of witnesses required to will, 550.
holographic wills, how proved, 557.
marriage of single woman avoids her will previously made, 566.
marriage and birth of child revokes will, 567.
certified copy of will duly probated and recorded, admissible in evidence, 579.
wills are required to be filed and recorded in office of probate, 580.
copy of foreign will duly proved in home jurisdiction, may be admitted to probate in, 574.
ASSENT. See ACCEPTANCE; CONSTRUCTION.
ASSIGNEE,
of lease, must be named to be affected by covenants, when, 303, 304.
of reversion of lease, should give notice of the assignment to tenant, 335, 336.
of mortgage, rights and liabilities of, 457, 463.
right of, to execute power of sale in a mortgage, 431, 432, 514, 515.
ASSIGNMENT,
form of conveyance by, 60.
applies more specifically to terms of years, 60.
of lease, distinguished from under-lease, 281, 326.
effect of, upon covenants generally, 300, 304.
effect of, upon covenants to pay rent, 310, 332, 333.
upon covenant to renew, 302.
to insure, 315.
not to use premises for purposes of trade, 316.
effect of, upon covenant against, 317, 318.
who may make an, 327, 330.
what will constitute an, 328.
rent may be reserved from, by special stipulation, 329.
of rent, without transfer of reversion, 329.
may be either in fact or in law, 330.

[The references are to pages.]

ASSIGNMENT—Continued.
what constitutes an, in law, 330.
form and requisites of an, in fact, 331.
proper covenants to be inserted in, 332.
effect of, upon liability of assignor, 332, 333.
rights and liabilities of assignees, 333, 334
of an assignee of the reversion, 335.
payment by tenant before notice of, 336.
of mortgage, how affected by different views of the nature of a mortgage, 448, 449.
under common-law doctrine of mortgages, 449, 454.
what conveyances will operate as an, 451, 452.
under equitable view of the nature of a mortgage, 454, 457.
who may exercise power of sale under, 514, 515.
See ASSIGNEE.
ASSIGNS,
must be named in lease to be affected by covenants, when, 303, 304.
must be named in mortgage in order to execute power of sale, 431, 514.
See ASSIGNEE; ASSIGNMENT.
ASSUMPSIT,
the remedy against grantee for failure to perform duty prescribed in deed-poll, 68.
ATTESTATION,
of deed, not required at common law, 181.
number of witnesses required in the different States, 182.
qualification of attesting witnesss, 183.
witnesses must sign at grantor's request, 184.
of lease, witnesses required, 323.
of mortgage, governed by same law as purchase deeds, 374.
of will, number of witnesses required in the different States, 550, 551.
competency of the witnesses, 551, 552.
persons beneficially interested in will, incompetent to attest it, 551.
witness must sign at request and in presence of testator, 552.
what is a sufficient request, 552.
what is, in presence of testator, 553.
witness may sign by mark, or his hand may be guided, 554.
whether he may adopt signature written by another, 554.
or by himself at another time, 554.
witnesses must subscribe their names *animo testandi*, 555.
should sign at the end of the will, 555.
and write their address opposite their respective names, 555.
clause of, not essential, but always desirable, 555.
what is a sufficient publication of a will, 556.
holographic wills require no attesting witnesses in some States, 557.
ATTORNEY,
execution of deed by, 217, 221.
form of acknowledgment of deed by, 226.
ATTORNMENT,
what is an, 336, note.
forfeiture of lease by fraudulent, 349.
AUCTIONEER,
at sale of land, regarded as agent of both parties, 11.
signature of, to executory contract of sale is binding upon both parties, 11.
See STATUTE OF FRAUDS.

B.

BANKRUPTCY. See FRAUDULENT CONVEYANCES.

[The references are to pages.]

BARGAIN AND SALE,
deed of, definition, 62.
may operate as a feoffment, 81.
proper words of grant in, 83.
consideration for, how far necessary, 62, 79.
whether freehold can be limited to commence *in futuro* by, 62, note.
may be good as covenant to stand seized, 80, note.
livery of seizin not necessary to, 62, 63.
required by statute of uses to be enrolled, 63.
statute did not apply to chattel interests, 63.
See CONSIDERATION; COVENANTS; USES.

BLANKS,
in deed, what may be filled, when, by whom, and by what authority, 25, 26.
See ALTERATION.

BOND FOR DEED,
an equitable mortgage, when, 390.

BOUNDARY,
establishment of, by adjoining proprietors, 93.
by stream or highway means the center, 95.
by large bodies of water, 96.
monuments control courses and distances in fixing, 92.
See DESCRIPTION; EVIDENCE.

BREACH. See CONDITION; COVENANT.

C.

CALENDAR MONTH,
usually intended, in this country, where lease is made for a month or months, 338.

CALIFORNIA,
covenants implied by words "grant, bargain and sell," in, 156.
homestead cannot be aliened except by joint deed of husband and wife in, 168.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgages by deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will same as if sole, 539.
devise to witness to the will how far void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
holographic wills how proved, 557.
marriage of single woman avoids her will previously made, 566.
marriage and birth of child revokes will, 567.
will executed and proved in accordance with law of place of testator's domicil valid in, 574.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate, 580.

CANCELLATION,
of deed does not revest title in grantor, 24.
a different rule prevails in what States, 25.
of mortgage,
See DISCHARGE.

[The references are to pages.]

CAPACITY,
of parties to deed, 28, 44.
to power of attorney, 208, 212.
to lease, 276, 284.
to will, 536, 542.
of officer to take acknowledgment, 228.
of attesting witnesses,
See ATTESTATION.
CESTUI QUE TRUST,
in simple trust, entitled to rents and profits, 120.
may dispose of land and call upon trustee to make conveyance, 120.
See TRUSTS.
lease of, without concurrence of trustee, invalid, 283.
CHAMPERTY.
See DISSEIZEE.
CHARITABLE USES,
grants to, how far an exception to general rule requiring parties to be *in esse*, 44, note.
CHATTELS REAL.
See LEASE.
CHOSES IN ACTION,
not assignable, 141.
See COVENANT.
CODICIL,
definition of, 535.
must be executed with same formalities as a will, 535.
a constructive republication of a will, 569.
COLLATERAL POWER,
definition of, 125.
COLORADO,
wife's deed of homestead must be signed as well as acknowledged apart from her husband, 169.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
wife can will half of her real estate without husband's consent, but no more, 539.
same as to husband, 539.
devise to witness to the will how far void, 541.
number of witnesses required to will, 550.
will required to be produced for probate, within ten days after death of testator, 572.
will executed and proved in accordance with law of place of testator's domicil, valid in, 574.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate, 580.
COMMON LAW,
conveyances deriving their effect from, 55.
COMMON RECOVERIES. See FINE AND RECOVERY.
COMMON SEAL. See CORPORATION; SEAL.
CONDITION,
in deed, definition of, 108, 109.
general and special defined, 109.
distinction between precedent and subsequent, 109.

[The references are to pages.]

CONDITION—Continued.
whether precedent or subsequent depends upon intention, 109.
effect of, if impossible or unlawful, 110.
in restraint of alienation or marriage void, 110.
distinguished from covenants, 111.
from limitation, 112.
from remainder, 112.
annexed to power must be strictly complied with, 127.
in lease, purpose and form of, 291, 296.
what covenants may be enforced by, 291.
must not be unlawful, 291, 292.
of forfeiture, strictly construed, 292.
what demand necessary to make available, 292.
what will constitute breach of, 293.
who may take advantage of forfeiture, 294.
once waived cannot be enforced again, 296.
until enforced by re-entry, estate remains in lessee, 296.
forfeiture for breach of, how waived, 339, 342.
when equity will interfere to prevent forfeiture, 341.
in mortgage, usual form of, 401.
special stipulations in form of, 416, 429.
not broken until expiration of time allowed for grace on note, 413.
what constitutes a breach of, 414, 496, 502.
that upon default as to part, the whole debt shall become due, 414.
See DEFEASANCE.

CONDITIONAL LIMITATION,
definition of, 112.

CONDITIONAL SALE,
distinguished from mortgage, 383.

CONFIRMATION,
definition of, 59.
may operate upon voidable, but not void estates, 60.
requirements to a valid, 60.
effect of, in United States, 60.

CONFLICT OF LAWS,
what law governs the acknowledgment of deed, 227.
as to interest and usury laws, 418.

CONNECTICUT,
effect of covenant of seizin in, 137.
when taxes are a lien upon land in, 142, note.
public highway an incumbrance in, 145.
measure of damages for breach of covenant of warranty in, 161, 162.
two witnesses required to a deed in, 182.
competency of witnesses to deed in, 183.
record of deed constructive notice from date of filing only, 246.
the common-law doctrine of mortgages prevails, 372.
equity jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
strict foreclosure the usual form, 506.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 539.
devise to witness to will when void, 541.
qualification of witnesses to will, 541.
marriage and birth of child revokes will, 567.
time allowed for probating will, 572.
foreign will not required to be first proved in place of testator's domicil, 574.
whether wills are required to be recorded in, 579.

[The references are to pages.]

CONSENT. See AGREEMENT; CONTRACT.

CONSIDERATION,
in contract of sale, whether must appear in writing, 6.
must be valuable in order to enforce specific performance, 17.
mere inadequacy of, will not prevent enforcement of contract, 17.
in deed, of two kinds, good and valuable, 78.
what is a good, 78.
what a valuable, 78.
what necessary to support covenant to stand seized, 61, 79, 80.
to support deed of bargain and sale, 62, 79, 80.
marriage a valuable, when, 51, 78.
when necessary, 78.
need not be expressed in deed, 79, 80.
payment of, when material, 80.
expressed, how far open to explanation or contradiction, 81.
for what purposes, 81.
expressed, *prima facie* evidence of amount paid, 81, 82.
See FRAUDULENT CONVEYANCE.
in lease, necessity of, 289.
may consist in what, 289.
if fraudulent, immoral or unlawful, lease is void, 289.
in mortgage, need not be expressed, 397.
seal imports a sufficient, 397.
debt secured, the real consideration, 397.
a debt essential to support mortgage, 397.
effect of illegal, 403, 404.

CONSTITUTIONALITY,
of statutes designed to cure defects in acknowledgments, 240.

CONSTRUCTION,
of contract of sale, parol evidence admissible, when, 8.
See DESCRIPTION; EVIDENCE.
of deed, must if possible give it effect, 66, note, 83, 92.
of words of grant, covenants implied from, 84, 154.
of description of land, rules for, 89, 100.
See DESCRIPTION.
of will, 582, 598.
intention of testator the governing principle, 583.
general rules for, 584, 588.
of misnomer or misdescription of devisee, 589.
who are entitled under the description as devisees, 590.
when devisees are described as a class, whether they take *per stirpes* or *per capita*, 592.
of words, "heirs," "next of kin," "relatives," "family," etc., 591.
See RULE IN SHELLEY'S CASE.
as to what general words carry real estate, 593.
as to the estate or interest which passes, 594.
as to the description of the property devised, 595.
of power in will to sell land, 596.
by what words power is created, 596.
of the execution of power in will, 598.

CONSTRUCTIVE TRUSTS.
See TRUSTS.

CONTINGENT REMAINDER,
distinguished from conditional limitations, 112.

CONTRACT,
for purchase and sale of land, must be in writing, 2.
need not be under seal, 10.

[The references are to pages.]

CONTRACT—Continued.
writing must contain what, 5.
memorandum of sheriff or auctioneer sufficient, 5.
whether the consideration must be expressed in, 6.
need not be contained in a single document, 7.
writings must relate to same transaction, 7.
sufficient if property intended can be ascertained, 6.
what a sufficient signing of, under Statute of Frauds, 9, 11.
authority of agent to make, need not be in writing, 10.
otherwise in some States, 10.
when made by agent should purport to be act of principal, 11.
parol, may be enforced when, 12.
rights of purchasers under, 15.
See EVIDENCE; STATUTE OF FRAUDS.
in mortgage, abridging right of mortgagor to redeem, void, 379.
See INTEREST; USURY.
CONTRIBUTION,
between mortgagees, to redeem, 476.
CONVEYANCES. See DEEDS; LEASES; MORTGAGES; WILLS.
COPY,
of record, how authenticated for use in another State, 575.
See REGISTRATION.
of will, may be used in evidence, 579, 580.
to be recorded in registry of deeds, 580.
of foreign will, probate of, 573.
where recorded, 580.
See PROBATE.
CORPORATIONS,
effect of grant to unorganized, 44, note.
prohibited by statute of mortmain from holding land, 42.
may within certain limits hold land, 42, 43.
created in one State, may hold land in another, 43.
right of State to make terms upon which land may be held by, 43.
signing deed by, 176, 177.
seal of, to be attached to deed, by whom, 181.
delivery of deed by and to a, 201.
acknowledgment of deed by, 226.
effect of actual notice of deed to one member of, 258.
power of, to make leases, 282.
COVENANT,
running with land passes by quitclaim deed, 65.
whether party to indenture is liable on, 68.
implied by words of grant, 84.
reservation when construed as, 107.
distinguished from a condition, 111.
in deed, definition of, 132.
no special form of words necessary to create a, 132.
constitutes no part of conveyance, 132.
definition of, expressed and implied, 133.
as to implied, 154.
distinction between real and personal, 133.
what, runs with the land, 133.
what usually inserted in deed of full covenants, 134.
purchaser of land without, has no remedy on failure of title, 134.
of seizin and right to convey, 135.
extent of, 135, 136.
runs with land, where, 135.
when broken, 136, 139.

[The references are to pages.]

COVENANT—Continued.
against incumbrances, object and effect of, 139.
whether a covenant running with the land, 139, 140.
by what broken, 142, 146.
whether public highway, an incumbrance, 144, 145.
of warranty, history and nature of, 146, 147.
runs with the land, 146.
estoppel by, 147.
what constitutes a breach of, 148, 152.
what will amount to an eviction, 149, 150.
of special warranty, nature of, 152, 153.
for further assurance, purpose of, 154.
implied, definition of, 154, 155.
what words are construed to imply, 154
what implied by "grant and demise," 154, 287.
In what States implied by "grant, bargain and sell," 155, 156.
what implied by, 155, 156.
may be express and implied both in same deed, 157, 158.
general implied, limited by an express, 158.
dependent and independent defined, 158.
dependent or independent depends upon intention, 158.
damages recoverable for breach of covenant of seizin, 159, 160
of covenant against incumbrances, 160, 161.
of covenant of warranty, 161, 162.
whether attorney's fees are included, 162.
in lease, what may be enforced by condition, 291.
purpose of, 297.
express and implied, 297.
what implied on part of lessor, 297, 299.
for quiet enjoyment, extends only to possession, 298.
when lease contains express, none will be implied, 298.
lessor not bound to repair in absence of express, 298, 299, 307.
what implied on part of lessee, 299, 300.
who bound by implied, and who by express, 300, 301.
effect of assignment of lease upon, 301.
distinction between real and personal, 301.
what, run with land, what do not, 302.
effect of covenant in lease running with land, 303.
when assignee of lease must be named to be affected by, 303.
what are usual on part of lessor, 304.
for quiet enjoyment, 304.
to repair, 305-308.
liability of landlord for repair on tenement house in absence of covenant, 305, 306.
to renew the lease, 308.
for continued renewals not favored, 308.
terms of renewal should be clearly stated in lease, 308.
specific performance of, to renew, 309.
against incumbrances, and for further assurance, 310.
what are usual, on part of lessee, 310.
to pay rent, 310, 314.
effect of assignment of lease upon, 310.
effect of destruction of premises upon, 311.
effect of eviction of lessee, 312.
what constitutes an eviction, 312, 313.
to pay taxes, 314, 315.
what charges upon land are included in, 314.
to insure the premises, 315, 316.
when a real covenant, 315.

[The references are to pages.]

COVENANT—Continued.
what is a breach of, 316.
not to use the premises for purposes of trade, 316.
effect of, upon assignee of lease, 316.
not to assign or underlet, 317.
whether a covenant running with the land, 318.
to deliver up premises in good repair, 318.
effect of destruction of premises upon, 319, 320.
in mortgage, for title, value of, 416.
for payment of interest, 417, 422.
to keep premises in repair, 422.
for the payment of taxes, 423.
to keep the premises insured, 425.

COVENANT TO STAND SEIZED,
definition of, 61.
what consideration necessary to, 79, 80.
the doctrine of, resorted to in the construction of deeds, 61.

COVERTURE. See MARRIED WOMEN.

CREDITOR. See FRAUDULENT CONVEYANCE; REGISTRATION.

CRIME,
persons convicted of, incapable of making will, 541.

CUSTOM,
local, parties to lease are supposed to contract with reference to, 272, 273.

D.

DAKOTAH,
homestead cannot be alienated, except by joint deed of husband and wife in, 168.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 539.
devise to witness to will when void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 541.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.

DAMAGES,
recoverable for breach of covenant of seizin, 159, 160.
for breach of covenant against incumbrances, 160, 161.
for breach of covenant of warranty, 161, 162.

DATE,
of deed, presumptive evidence of time of execution and delivery, 185, 186.
in lease, fixes the time of commencement of term, unless otherwise specified 286.
effect of uncertainty in, 286.

DAY,
whether included or excluded in computing time of termination of lease, 338.

DEATH,
when a revocation of a power of attorney, 216.

DEED,
definition of, 19.
how distinguished from an agreement for, 18.

[The references are to pages.]

DEED—Continued.
estoppel by, 19.
must be upon paper or parchment, 20.
must be in writing, 20.
printing included within the term writing, 20, 21.
whether a printed signature to a, is sufficient, 21.
whether writing with pencil is sufficient, 21.
effect of cancellation or destruction of, for the purpose of re-vesting title, 24
must be completely written before delivery, 22.
as to alteration of,
See ALTERATION.
as to filling up blanks in,
See BLANKS.
who may make, 28, 44.
different forms of, 55, 68.
forms of, in use in the United States, 66.
distinction between indentures and deeds-poll, 67.
liability of one who accepts, but does not sign an indenture, 68.
remedy against grantee failing to perform covenants in deed-poll, 68.
date of, where inserted, 69.
date, how far essential to validity of, 69.
takes effect from delivery and not from date, 69.
date, *prima facie* evidence of time of delivery, 69.
date may be contradicted, 69.
presumption as to delivery when acknowledged subsequent to date, 69.
names of parties to, effect of uncertainty in, 70, 75.
whether grantor must be named in body of, 71, 72.
grantee must be *in esse*, 72, 73.
purpose of recitals descriptive of the parties to, 74.
as to recitals in,
See RECITALS.
granting clause, showing intention to convey, essential to, 83.
no particular form of words required, 83.
construction of words of grant as affecting the conveyance, 83.
as to the covenants implied by words of grant, 84.
See COVENANTS.
description of premises, must be sufficient to identify the land, 86.
when ambiguous premises may be located from references, monuments, etc., 86.
parol evidence may be resorted to for what purpose, 87.
description may be reformed, when, 88.
rules of construction applicable to the description of the premises, 88, 100.
See CONSTRUCTION.
habendum, not an essential part of a, 100.
object and purposes of the *habendum* in a, 101.
construction when *habendum* is repugnant to the grant, 102.
habendum cannot introduce new subject matter into the grant, 102.
whether person not named in grant may take under *habendum*, 102.
how far the *habendum* may explain or limit the premises of the grant, 103.
limitation of the fee by word "heirs," etc.—rule in Shelley's Case, 103.
freehold must not be limited to commence *in futuro*, 104.
reddendum, object and purpose of, 106.
distinction between a reservation and an exception, 106.
the appropriate words for a reservation, 106.
reservation sometimes construed as an implied covenant, 107.
essentials to a good reservation, 107.
conditions, limitations, etc., purposes and effect of, 108.
whether a condition is precedent or subsequent depends upon the intention, 109.

[The references are to pages.
DEED—Continued.
effect of impossible or unlawful condition, 110.
condition distinguished from covenant, 111.
conditions distinguished from limitations and remainders, 112, 113.
uses, trusts and *powers*, nature of, defined, 113, 131.
(See *the several heads.*)
covenants for title in a, 132, 162.
what are usual in a, 163.
covenants of seizin, and right to convey, 135, 139, 159.
covenant against incumbrances, 139, 146, 160.
covenant of warranty, 146, 153, 161.
of special warranty, 152, 153.
covenant for further assurance, 154.
implied covenants in, 154, 158.
whether covenants are dependent or independent, 158.
See COVENANT.
testimonium clause in, purposes of, 163.
it must appear that parties intended to execute sealed instrument, when, 163
dower and homestead, how relinquished, 164, 172.
See DOWER; HOMESTEAD; SEAL.
reading, to a grantor who cannot read, when essential, 173.
fraud or mistake in reading vitiates, 174.
signing required by Statute of Frauds, 175.
what is a sufficient signature to, 175.
signature by third person in presence of grantor, 175.
authority of agent to sign, must be in writing under seal, 175, 176.
effect of signature by wrong name, 176.
forged signature void, 176.
signature by attorney in fact, 176.
signature by corporation, 176.
See SIGNATURE.
sealing of, indispensable at common law, 177.
seals abolished in some States, 178.
effect of, 178.
common-law seal defined, 178.
scroll may be used as seal where, 179.
immaterial who affixes the seal, 180.
several persons may adopt the same seal, 181.
sealing of, by corporation, 180.
attesting witnesses not required at common law, 181.
in what States witnesses are required to, 182, 183.
qualification of attesting witnesses, 183.
witnesses must sign at grantor's request, 184.
See ATTESTATION.
delivery of a, 184, 207.
See DELIVERY.
power of attorney to execute, 208, 217.
See POWER.
execution of, by attorney, power must be strictly pursued, 217, 221.
form in which the authority must be executed, 219, 220.
acknowledgment of, 222, 241.
See ACKNOWLEDGMENT.
registration of, 241, 268.
See REGISTRATION.
proof of, by subscribing witnesses, 241.
general requisites of a, apply to mortgages, 374, 375.
under power of sale contained in mortgage, 530, 532.
distinction between a will and, 535.
DEED-POLL,
defined and distinguished from indenture, 67, 68.

[The references are to pages.]

DEED OF TRUST,
in the nature of mortgage, distinguished from absolute, 388.
incidents of, in nature of mortgage, 389.
See MORTGAGE.

DEFEASANCE,
deed of, defined, 60.
for what purpose used, 61.
effect of, 61.
in mortgage, form of, 375.

DELAWARE,
covenants implied by words "grant, bargain and sell" in, 156, 157.
a scroll may be used as a seal in, 179.
two witnesses required to deed in, 182.
one year allowed for recording deeds, 247.
method of releasing mortgages, 491.
a married woman can only make a will by consent of her husband, 539.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
marriage revokes will of husband unless provision is make for wife, 567.
foreign will not required to be first proved in place of testator's domicil, 575.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded, admissible in evidence, 580.
age at which persons may make will of real estate in, 537.

DELIVERY,
of deed on Sunday, void, 53.
deed takes effect from time of, 69, 70, 185.
presumption as to date of, 69, 185.
presumption may be rebutted, 69.
presumption as to date of, when there are several grantors, 70.
no legal presumption of, from signing and acknowledging deed, 185.
what will constitute, 186, 188.
manual, not necessary, 186.
always a question of intention, 188.
deed stolen or obtained by fraud will not take effect, 189, 190.
grantor estopped from denying, when, 189.
must be known and assented to by the grantee, 190.
to third person for grantee's use, 191.
at what time title passes, 192.
doctrine of relation, 193.
may be made good by subsequent ratification, 194, 196.
to constitute, grantor must divest himself of all control over deed, 182.
effect of registration of deed, as constituting, 196.
presumed from possession of deed, 199.
acceptance presumed from beneficial nature of deed, 199.
acceptance presumed from relationship, 200.
of deed to married woman, 200.
of deed to several grantees, 200.
by several joint owners, 201.
of deeds by and to corporations, 201.
deed must be completely executed before, 201.
effect of alteration of deed after, 202.
deed having been delivered, cannot be revoked, 202.
question of, always open to proof, 203.
what is an escrow, 204, 205.
deed never an escrow if delivered to grantee, 204.
requirements to an escrow, 205.

[The references are to pages.]

DELIVERY—Continued.
condition of escrow must be performed before deed will take effect, 205.
second delivery of escrow relates back to first, 206, 207.
See ALTERATION.

DEMAND,
what necessary to enforce condition, 292.
may be waived by stipulation, 293.

DEMISE,
words of, employed in creation of term of years, 287.
covenants implied by words "grant" and "demise," 287.
See LEASE.

DEPOSIT OF TITLE DEEDS,
as security for debt, amounts to an equitable mortgage, where, 391.

DESCRIPTION,
of land, in contract of sale, 5.
in deed, must afford means of identifying the land, 86.
if subject of grant cannot be ascertained, deed will be void, 86.
if ambiguous, premises may be located from references, monuments, etc., 87.
extrinsic evidence admissible, when, 87.
may be introduced to explain but not to contradict deed, 87.
not admissible where identity of land is wholly uncertain, 87.
may be reformed so as to cover land intended, 88.
under what circumstances deed may be reformed, 88.
when rules of construction may be resorted to, 88.
if intention clear, rules of construction cannot be invoked, 88.
general rules of construction as to, 88, 100.
in lease, 288.
in mortgage, 398.
in notice of sale, 519.
of debt secured by mortgage, 409, 413.
of devisees, who are entitled under, 590.
See CONSTRUCTION.

DESTRUCTION,
of deed,
See CANCELLATION.
of premises leased,
See COVENANT.

DETERMINATION,
of leases, mode of, 337, 338.
by lapse of time, 338.
by the happening of a specified event, 338.
by forfeiture for breach of condition, 339.
effect of waiver of breach of condition, 340.
waiver by receipt of rent, 341.
when equity will grant relief from consequences of forfeiture, 341.
by merger, 342, 344.
how merger is produced, 342.
requisites to a merger, 343.
by surrender, 344.
distinction between surrender and merger, 344.
essentials to a valid surrender, 345.
effect of a surrender, 345.
surrender may be in express words or by operation of law, 345.
essentials to an express surrender, 345.
proper form of words for an express surrender, 346.
surrender cannot affect rights of assignee, 346.
of surrender by operation of law, 347, 348.

The references are to pages.

DETERMINATION—Continued.
what facts will constitute a legal surrender, 348.
by disclaimer of tenant, 349.
what acts will constitute disclaimer, 349.
by failure of lessor's title, 350.
by eviction of tenant, 350, 351.
what constitutes eviction, 351.
effect of destruction of the premises, 352.
by force of statute, 352.
by the policy of the law, 352.

DEVISE,
of the parties to a, 536, 542.
parties to a, must be competent, 536.
age at which persons can make a, 537.
capacity of married women to make a, 538, 539.
of persons of non-sane mind, 539.
whether deaf, dumb and blind persons can make a, 540.
whether person convicted of crime can make a, 541.
who may take property by, 541.
to attesting witnesses to will, whether valid, 541, 542.
proper subject-matter essential to a, 542.
law of country where property situated governs a, 543.
what estate or interest will pass by a, 543.
whether after-acquired property will pass by, 544.
effect of, when cumulative, 544.
effect of, disposing of property according to law, 544, 545.
land, when to be regarded as money under a, 545.
See WILL.

DEVISEE,
who may be a, 541.
who is entitled under description of, 588, 593.
See CONSTRUCTION; DEVISE.

DISABILITY. See PARTIES.

DISCHARGE,
whether payment of mortgage constitutes a, or assignment, 486.
of mortgage, who may make or enter, 487, 488.
modes of effecting a, 489, 492.
by entry in margin of the record, 491.
by deed of release, 492.
effect of, as to part of the mortgaged premises, 492, 493.
effect of, obtained through fraud or mistake, 494.

DISSEIZEE,
deed of, how far valid, 29.
of land, cannot make valid lease, 276.
operation of lease of, by way of estoppel, 277, 278.

DISTRICT OF COLUMBIA,
six months allowed for recording deeds, excepting deeds of trust and mortgages, 246.
lien exists in favor of vendors for purchase-money, 393.

DOWER,
existence of right of, an incumbrance, 142.
form of release of, 164, 168.
cannot be alienated separate from the fee, 164.
whether release of, must appear both in body of deed and acknowledgment, 164.
how released at common law, 165.
separate examination of wife, on release of, 166.

[The references are to pages.]

DOWER—Continued.
may be claimed in what lands, 166.
mere instantaneous seizin will not vest, 167.
deed insufficient to convey without specific words of release, 167, 168.
whether wife may bar, by signing and sealing husband's deed, 168.
relinquishment of, by power of attorney, 215.

DURESS,
deed made under, is voidable, 35, 36.
degree and kind of violence or threats necessary to avoid a deed for, 36.
threats of legal measures will not avoid a deed, 36.
age, sex, health and disposition of party must be taken into consideration, 36.
will invalidated by, 540.

E.

EMBLEMENTS,
tenant for life entitled to, 270.

ENROLLMENT. See REGISTRATION.

ENTRY AND POSSESSION,
foreclosure of mortgage by, 508.

EQUITABLE MORTGAGE.
See MORTGAGE.

EQUITY,
jurisdiction of, over execution of powers, 130.
will grant relief against forfeiture for breach of condition in lease, when, 341.
power of court of, to enforce foreclosure of mortgage, 505, 506.

EQUITY OF REDEMPTION,
origin of doctrine of, 358.
contracts restricting, void, 379.
as to purchasers of the, 438, 447.
distinction between purchaser of, and one who buys property subject to a mortgage, 438, 439.
whether purchaser assumes or buys subject to a mortgage, a question of intention, 439.
of a purchaser of the, subject to the mortgage, 440 443.
of a purchaser of the, who assumes the mortgage, 443, 447.
of a purchaser of part of the mortgaged property, 447.

ERASURE. See ALTERATION.

ESCROW,
what is an, 204.
requisites of an, 204, 205.
condition of, must be performed to give effect to deed, 205, 206.
second delivery of, relates back to first, 206, 207.

ESTATE-TAIL,
form of deed used to convey an, 56.

ESTATE FOR LIFE,
how created, 270, 271.
See LEASE.

ESTOPPEL,
effect of covenant of warranty as an, 147.
operation of lease of disseizee by way of, 277, 278.
See CANCELLATION; DEED; DELIVERY; RECITALS.

ESTOVERS,
tenant for life entitled to, 271.

[The references are to pages.]

EVICTION,
definition of, 148.
what is such an, as will constitute a breach of the covenant of warranty 148, 152.
effect of, upon implied covenants in lease, 298, 299.
upon covenant for quiet enjoyment, 304.
will determine tenancy, 350, 351.

EVIDENCE,
parol, not admissible to vary terms of written contract, 8.
under what circumstances admissible, 8.
contemporaneous conversations and agreements not admissible, 8.
may be introduced to show meaning of technical terms of art, 8.
to show usages and customs, 8.
to explain latent ambiguities, 8.
may be admitted to charge an unnamed principal of an executory agreement for sale of real estate, 11.
but not to discharge the actual signer, 11.
admissible to prove real consideration of deed, when, 81.
not admissible to contradict terms of deed for purpose of affecting title, 82.
when admissible to explain description in deed, 87.
contemporaneous writings to explain description in deed, 89.
reputation, when admissible to locate boundary lines, 94.
to make different two instruments, a mortgage, 377.
to prove an absolute deed a mortgage, 380-383.
See ACKNOWLEDGMENT; CONSIDERATION; RECITALS.

EXCEPTION,
effect of, upon grant, 99.
requisites of an, 99.
appropriate words for an, 99.
distinguished from a reservation, 106.

EXCHANGE,
as a mode of conveyance defined, 57.
requisites to, 58.

EXECUTION,
of deed,
See DEED.
of lease,
See LEASE.
of power,
See POWERS.
of will,
See WILL.
sale of term of years under, constitutes an assignment of lease, 330.

EXECUTORS AND ADMINISTRATORS,
power of, to make leases, 283.
term of years passes to, as assignees of lease, 331.

EXECUTORY CONTRACT. See CONTRACT.

EXECUTORY INTERESTS. See USES; TRUSTS.

F.

FARM LET.
the usual operative words in a lease, 287.

FEME COVERT. See MARRIED WOMEN.

FEOFFMENT,
the earliest modes of conveyance, 55.

[The references are to pages.]

FEOFFMENT—Continued.
original signification of the term, 55.
consisted in delivery of possession actual or constructive, 55.
by deed, livery of seizin not essential to, 56.
proper words of grant in deed of, 83.

FILLING BLANKS. See BLANKS.

FINE AND RECOVERY,
object and effect of, 64.
how affected by Statute of Uses, 64.
never prevailed in the United States, 64.

FIXTURES,
what are included in a mortgage, 399.
attached to premises, and severed by fire, belong to whom, 320.

FLORIDA,
what constitutes a sufficient seal in, 179.
a scroll may be used as a seal, 179.
record of deed constitutes notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate, 537.
married women may devise and bequeath the same as if sole, 539.
qualification of witnesses to will, 550.
foreign will which has been duly probated in place of domicil, may be recorded, and such record has the effect of probate, 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded, admissible in evidence 580.

FORECLOSURE,
of mortgage, how far an extinguishment of the debt, 484.
when right of, accrues, 496.
See CONDITION.
when right of, is barred by limitation, 500-503.
See LIMITATION.
definition and general nature of, 503, 504.
must be according to law of the State where the land is situated, 504.
methods of, in the different States, 504.
by suit in equity, 505-507.
strict, 506.
by decree of sale, 506, 507.
by proceedings at law, 507.
judgment may be rendered for balance unpaid after sale, 507.
writ of entry, 508.
by entry and possession, 508.
by sale under power contained in a mortgage, 509, 532.
See POWER OF SALE.

FORFEITURE. See CONDITION.

FORGERY,
of name of grantor to deed, 164.
forged deed not protected by the recording acts, 244.

FRAUD,
of grantee, effect of, upon deed, 42.
grantor who avoids deed for, must restore the consideration, .
in reading, vitiates deed, 162.
release of mortgage obtained by, may be set aside, 476.
See FRAUDULENT CONVEYANCE; STATUTE OF FRAUDS.

The references are to pages.

FRAUDULENT CONVEYANCE,
when conveyance will be deemed fraudulent, 44.
fraud which avoids conveyance consists in what, 44.
deed made for valuable consideration, valid as to innocent purchaser, 44.
fraudulent intent must be shared in by grantee, 46.
effect of valuable consideration, when fraud participated in by grantee, 46.
inadequacy of consideration not sufficient to set aside deed, 46, 47.
what circumstances must unite to make conveyance fraudulent, 47.
whether intent to defraud must be shown, 47.
is valid as against grantor and his heirs.
See VOLUNTARY CONVEYANCE.
conveyance intended to give undue preference to creditors, void, 52.
effect of bankruptcy and insolvent laws in avoiding conveyance, 52.

FREEHOLD,
whether a, may be limited to commence *in futuro*, 104.

G.

GEORGIA.
homestead cannot be aliened except by joint deed of husband and wife in, 168.
a scroll may be used as a seal, 179.
two witnesses required to deed, 182.
one year allowed for recording deeds, 247.
precedence between deeds recorded after prescribed time, 248.
deed not indexed imparts notice, 267.
the equitable doctrine of mortgages prevails, 372.
equitable mortgage by deposit of title deeds, 391.
no lien exists in favor of vendors, 393.
age at which persons may make will of real estate, 537.
a married woman can only make a will by consent of her husband, 539.
property acquired after execution of will may pass by it, if so intended, 544.
qualification of witnesses to will, 550.
devise to witness to will void, 541.
marriage or birth of child revokes a will, 567.
certified copy of will duly probated and recorded, admissible in evidence, 580.
wills are required to be filed and recorded in office of probate, 580.

GIFT AND DEMISE,
deed of, defined, 56.
what passes by, 56.

GRANT,
deed of, formerly a conveyance of incorporeal rights, 56.
is now sufficient to carry every interest in land, 57.

GRANTEE. See PARTIES.

GRANTING CLAUSE,
essential to the operation of deed as a conveyance, 83.
any words showing an intention to convey, sufficient as, 83, 84.
covenants implied by words of, 84, 85.
See COVENANTS.
without words or limitation or inheritance create a life estate, 85.
in a mortgage, corresponds to the operative part of a deed, 398.

GRANTOR. See PARTIES.

H.

HABENDUM,
not an essential part of a deed, 100, 101.

[The references are to pages.]

HABENDUM—Continued.
object of an, 101.
effect of, when repugnant to premises of grant, 101.
cannot introduce new subject-matter, 101.
effect when more property is described in, than is granted, 101.
whether persons not named in granting clause may take under the, 102.
effect of, upon estate limited, 102, 103.
whether, can abridge estate granted, 103.
use of the, where no estate is limited in granting clause, 103.
limitation of fee in, without the word "heirs," 103.
rule in Shelley's Case, 103.
how far in force in United States, 104.
whether freehold may be limited to commence *in futuro*, 104.
purposes of, in a mortgage, 400.
See CONSTRUCTION.

HIGHWAY,
when boundary, means center of, 95.
whether an incumbrance, within covenant against, 144, 145.

HOMESTEAD,
alienation of, whether wife's concurrence is necessary, 168, 169.
whether power to sell, includes power to mortgage, 169.
form of relinquishment of, 164, 165.
cannot be aliened separate from the fee, 164.
whether relinquishment of, must appear in body of deed and acknowledgment, 165.
manner of alienation of, 168-172.
wife's acknowledgment to, 168.
statutory requisites must be strictly complied with, 170, 171.
land not dedicated as, not subject to restriction, 172.
what constitutes dedication of, 172.
abandonment of, 172.

HUSBAND AND WIFE.
at common law, could not convey directly one to the other, 39.
under what circumstances courts of equity gave effect to deeds between, 40.
whether deed to, conveys to them as tenants in common or in entirety, 41.
deed by to wife's land must be acknowledged as regained by statute, 227.
effect of notice of unrecorded deed, where land bought by wife, 258.
power of husband over wife's chattel interests in land, 280.
right of husband to make lease of wife's land, 280.
marriage an assignment in law to husband of wife's chattel, 330.
See DOWER; HOMESTEAD; VOLUNTARY CONVEYANCE.

I.

IDIOT.
See NON-SANE PERSONS.

ILLINOIS.
consideration not necessary to deed of bargain and sale in, 62.
covenant against incumbrances runs with land, when, 140.
covenants implied by words "grant, bargain and sell" in, 156.
homestead cannot be aliened except by joint deed of husband and wife, in, 168.
homestead how relinquished in, 168.
a scroll may be used as a seal in, 179.
certificate of acknowledgment which fails to show county of notary invalid, 230.
record of deed constructive notice from date of filing only, 246.

[The references are to pages.]

ILLINOIS—Continued.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382
equitable mortgage by deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will how far void, 541.
number of witnesses required to will, 550.
will revoked by subsequent marriage, 567.
will executed and proved in another State and duly certified, admissible in evidence in, 574.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
foreign will not required to be first proved in place of testator's domicil, 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded admissible in evidence, 580.

IMPLIED COVENANTS.
See COVENANT.

INCUMBRANCE.
See COVENANT.

INDENTURE,
deed by, defined and distinguished from deed poll, 67, 68.
leases usually by, 325.
See DEED.

INDIANA,
whether re-delivery of deed for purpose of cancellation revests title in grantor, 25.
covenant of seizin runs with the land in, 135.
covenant against incumbrances held to run with the land, 140.
public highway an incumbrance in, 145.
what constitutes sufficient seal in, 163.
homestead cannot be aliened, except by joint deed of husband and wife in, 168.
deed defectively acknowledged not admissible in evidence, 225.
certificate of acknowledging officer as to private examination of married women conclusive, 239.
forty-five days allowed for recording deeds, 247.
leases not in writing have the force and effect of estates at will, 322.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will, how far void, 541.
number of witnesses required to will, 550.
marriage of single woman avoids her will previously made, 567.
birth of posthumous child for whom no provision is made revokes will, 566 567.
copy of foreign will proved in home jurisdiction may be admitted to probate 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded admissible in evidence, 580.

INFANTS,
incapable of conveying land, 30.

[The references are to pages.]

INFANTS—Continued.
deed of, voidable, but not absolutely void, 30.
deed of, can be avoided when he becomes of age, 30.
right of, to avoid deed is personal, 30.
mere acquiescence after coming of age, will not amount to an affirmance of deed by, 31.
may avoid deed in what manner, 31.
must restore consideration, when, 31, 32.
what act will constitute an affirmance of the deed of, 32.
deeds made to, are voidable, 40.
lease of an, is voidable, 278.
may disaffirm lease, when of age, 279.
who may avoid lease of, 279.
while in possession, liable for rent, 279.
liable for necessaries, 279.
whether lodgings are necessaries, 279.
will of, valid in what States, and at what age, 537.

INJUNCTION,
to restrain sale under power in mortgage, when proper, 511.

INNOCENT PURCHASER. See FRAUDULENT CONVEYANCE; REGISTRATION; QUIT-CLAIM.

INSANE. See NON-SANE.

INSOLVENT LAWS. See FRAUDULENT CONVEYANCE.

INSURANCE.
covenant to insure, in a mortgage, 425-427.
right of mortgagee to take out, 426.
nature of covenant of, in a mortgagee, 425, 426.
See COVENANT.

INTEREST.
covenant for payment of, in mortgage, 417-422.
when usurious, 418-422.

INTERPRETATION.
of phrase, "interest in land," 3.
of phrase, "my farm," "this place," etc., 7, 288.
of words "heirs," "issue," etc., in will, 591.
of words "house," "barn," "homestead," etc., in will, 595.
See CONSTRUCTION.

INTOXICATION,
will render deed voidable, when, 37.
will not invalidate a deed, if no undue advantage is taken, 37.

IOWA.
effect of covenant of seizin in, 137.
covenant against incumbrances held to run with the land, 140.
homestead cannot be aliened except by joint deed of husband and wife in 168.
use of seals abolished, 178.
certificate of acknowledgment which fails to show county of notary, invalid, 230.
statutes designed to cure defective acknowledgments of deed in, 240.
record of deed constructive notice from date of filing only, 246.
record of deed not properly indexed is not constructive notice, 267.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.

[The references are to pages.]

IOWA—Continued.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will, how far void, 541.
property acquired after execution of will may pass by it, if so intended, 544
number of witnesses required to will, 550.
birth of posthumous child for whom no provision is made, revokes will, 566, 567.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 571.
wills are required to be filed and recorded in office of probate, 580.

J.

JOINT TENANTS.
cannot convey any particular part of the common estate without consent of co-tenant, 38.
deed of, valid as against all but his co-tenant, 38.
partition of lands between, 58.
leases by, 282.
JUDGMENT,
lien of, an incumbrance, 142.

K.

KANSAS,
homestead cannot be aliened except by joint deed of husband and wife in, 168.
use of seals abolished, 178.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 392.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 539.
devise to witness to the will, how far void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
will executed and proved in accordance with law of place of testator's domicil, valid in, 574.
certified copy of will duly probated and recorded admissible in evidence, 580.
wills are required to be filed and recorded in office of probate, 580.
KENTUCKY.
use of seals abolished in, 178.
deed good between parties without witnesses, 182
two witnesses required to deed in, 182.
sixty days allowed for recording deeds in, 247.
time for which parol leases are binding, 322.
the equitable doctrine of mortgages prevails, 372.
equity jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will same as if sole, 538, 539.

[The references are to pages.]

KENTUCKY—Continued.
devise to witness of the will how far void, 541.
number of witnesses required to will, 550.
holographic wills how proved, 557.
marriage revokes a will when, 567.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate, 580.

L.

LANDLORD AND TENANT,
See LEASE.
LAPSED DEVISES,
go to whom, 593
LEASE,
early mode of conveyance by, 57.
entry of lessee always essential to, 57.
may be made to commence at a future time, 57.
definition of a, 269.
modes of creating tenancies at common law, 270.
different species of, 270.
distinction between leases for life and for years, 270.
incidents of an estate for life, 271.
tenancy for life cannot be made to commence *in futuro*, 271.
effect of a grant without words of limitation, 271.
privileges and duties of a tenant for life, 271
incidents of a tenancy for years, 271, 272
tenancy for years a chattel interest, 272.
rights and liabilities of a tenant for years, 272.
agreements for, are of two kinds—express and constructive, 273, 274.
necessary incidents of a valid agreement for a, 274.
whether a lease or an agreement for a, 274.
effect of uncertainty as to length of term or amount of rent in agreement for a, 275.
parties to a, 276-283.
commencement and termination of a, 284-287.
a certain beginning and certain ending essential to term of years, 285.
term originally uncertain may be rendered certain, how, 285.
time for commencement of, how fixed, 286.
actual entry necessary in order to vest the estate in the lessee, 287.
form of words of demise in a, 287.
no particular forms necessary to, 287.
covenants implied by the words "grant" and "demise" in, 287.
See COVENANT.
description of premises in a, 288.
See CONSTRUCTION; DESCRIPTION.
reservation of rent in a, 289, 290.
form of, 289.
requisites to, 290.
conditions of forfeiture in a, 291-296.
See CONDITION.
covenants in a, 297-320.
See COVENANT.
execution of a, 321-325.
effect of Statute of Frauds upon, 321, 322.
in what the execution of a, consists, 323.

[The references are to pages.]

LEASE—Continued.
whether required to be acknowledged and recorded, 323.
how executed by agent, 323, 324.
assignment of a, defined, 326.
distinguished from sublease, 326, 327.
who may make, and what will constitute an assignment, 327-329.
what constitutes an assignment in law, 330.
requisites to an assignment in fact, 331.
proper covenants to be inserted in an assignment of a, 332.
effect of an assignment upon liability of lessee, 332, 333.
rights and liabilities of an assignee, 333, 334.
of an assignee of the reversion, 335.
modes of *determining*, 337-352.
whether month means calendar month, or lunar month, 338.
of tenant for life, terminated by his death, 338.
except when made under power, 339.
forfeiture of, by fraudulent attornment, 349.
by unlawful or immoral use of premises, 352.
See CONDITION; MERGER; SURRENDER.

LEASE AND RELEASE,
origin of, as a mode of conveyance, 63.
consisting of what, 63.
why said to amount to a feoffment, 64.
how far in use in United States, 64.

LESSEE,
covenants implied on the part of, 299, 300.
holds by privity of estate and contract, 332.

LESSOR,
covenants implied on the part of, 297, 298.

LIEN,
of judgment an incumbrance, 142, 143.
See VENDOR'S LIEN.

LIFE ESTATE,
existence of, as an incumbrance, 142.

LIMITATION,
when mortgagor's right of redemption is barred by, 468-470.
effect of statute of, in barring a foreclosure, 500-503.
See CONDITION; DEED.

LIVERY OF SEIZIN,
is the act of putting grantee into possession, 55.
feoffment required to be simultaneous, 55.
applicable only to estates in possession, 55.
not necessary in exchange of lands, 58.
necessary in case of partition of lands, 58.
not necessary in case of release, 58.
registration equivalent to, 242.

LOUISIANA,
age at which persons may make will of real estate in, 537.
married woman may devise and bequeath the same as if sole, 539
record of deed constructive notice from date of filing only, 246.
nature of a mortgage in, 372.

M.

MAINE,
assignee may maintain an action on covenant of seizin, 135.
public highway, an incumbrance in, 144, 145.

[The references are to pages.

MAINE—Continued.
measure of damages for breach of covenant of warranty in, 161.
record of deed constructive notice from date of filing only, 246.
what is actual notice sufficient to supply the place of registration in, 254.
leases are required to be acknowledged and recorded, when, 322.
leases not in writing have the force and effect of estates at will, 322.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgages by deposit of title deeds, 391.
no lien exists in favor of vendors, 393.
mortgage can only be assigned or transferred by deed, 448.
method of releasing mortgages, 491.
entry and possession the usual remedy for enforcing a mortgage, 508.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 539.
property acquired after execution of will may pass by it, if so intended, 544.
qualification of witnesses to will, 550.
birth of posthumous child for whom no provision is made revokes will, 566, 567.
limitation for probating wills, 573.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
whether wills are required to be recorded in, 580.

MAP,
incorporated in description by reference to, in deed, 98.

MARRIAGE. See CONSIDERATION; CONDITION.

MARRIED WOMEN,
cannot authorize third party to fill blanks and deliver deed, 27.
how far incompetent to convey land, 33, 34.
infancy of, will render deed voidable, 35.
at common law, deed to, was subject to dissent of husband, 41.
in most States lands may be conveyed to, free from control of husband, 41.
in what manner deed may now be made to, 41.
effect of deed to, not describing her as married, 41, 42.
effect of deed to, not purporting to be for her sole and separate use, 41.
execution of powers by, 127.
delivery of deed to, 200.
execution of power of attorney by, 209, 210.
may act as attorney to execute deed, 211.
private examination of, in acknowledgment of deed, 232-236.
lease of, when void, 280.
at common law husband can lease wife's lands, 280.
statutory right of, to hold and lease lands, 280.
at common law, could not be a lessee, 280.
right of, to lease land and hold a separate estate, 280, 281.
lease of, must be acknowledged separate from husband, 323.

MARYLAND,
a scroll may be used as a seal in, 179.
one witness required to deed in, 182.
certificate of acknowledging officer as to private examination of married women, conclusive, 239.
six months allowed for recording deed, 247.
the common-law doctrine of mortgages prevails, 372.
equity jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.

[The references are to pages.]

MARYLAND—Continued.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
qualification of witnesses to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 571.
wills are required to be filed and recorded in office of probate, 580.

MASSACHUSETTS,
deed of married women signed in blank and afterwards filled up, how far valid in, 27.
consideration of blood or marriage not essential to support covenant to stand seized in, 62.
effect of covenant of seizin in, 137.
assignee may sue on covenant against incumbrances, 111.
public highway an incumbrance in, 144, 145.
measure of damages for breach of covenant of warranty in, 161.
wife may release dower to owner of fee by her separate deed in, 166.
record of deed constructive notice from date of filing only, 246.
leases not in writing have the force and effect of estates at will, 322.
leases required to be by deed, when, 322.
entry by two partners under lease signed by one of them is a ratification by the other, 323.
mortgagee, how far owner of the fee, 363.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
mortgage can only be assigned or transferred by deed, 448.
method of releasing mortgages, 491.
entry and possession the usual remedy for enforcing a mortgage, 508.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 539.
devise to witness to will when void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
qualification of witnesses to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
will executed and proved in accordance with law of place of testator's domicil valid in, 574.
wills are required to be filed and recorded in office of probate in, 580.

MEASURE OF DAMAGES. See DAMAGES.

MERGER,
doctrine of, defined, 342.
how produced, 342, 343.
will not be adopted against intention of parties, 342.
nor where there are beneficial interests to be protected, 343.

MICHIGAN,
a scroll may be used as a seal in, 179.
two witnesses required to deed in, 182.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 392.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 539.
devise to witness to the will, how far void, 541.

[The references are to pages.]

MICHIGAN—Continued.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
will executed and proved in accordance with law of place of testator's domicil valid in, 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded admissible in evidence, 580.
MINNESOTA,
deeds required to be made direct to party in interest in, 67.
a scroll may be used as a seal in, 179.
two witnesses required to deed in, 182.
record of deed constructive notice from date of filing only, 246.
precedence between attachment creditor and holder of unrecorded conveyance, 264.
time for which parol leases are binding, 322.
leases required to be by deed, when, 322.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 392.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 539.
devise to witness to the will how far void, 541.
number of witnesses required to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate, 580.
wills to be recorded both in office of probate and in record of deeds, 580.
copy of will proved in other county may be recorded in county where land is situated, 580.
MISSISSIPPI,
what constitutes a breach of covenant of warranty in, 149.
covenants implied by words "grant, bargain and sell" in, 156.
manner of relinquishing dower in, 166.
what constitutes a sufficient seal in, 179.
a scroll may be used as a seal in, 179.
one witness required to deed in, 182.
three months allowed for recording deeds, 247.
time for which parol leases are binding, 322.
the equitable doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgage by deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
number of witnesses required to will, 550.
holographic wills how proved, 557.
birth of posthumous child for whom no provision is made revokes will, 566, 567.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
certified copy of will duly probated and recorded admissible in evidence, 580.
wills are required to be filed and recorded in office of probate, 580.
MISSOURI,
recitals in administrator's deed notice of his appointment, 75.

[The references are to pages.]

MISSOURI—Continued.
establishment of boundary by prescription, length of time required for, 94.
whether covenant of seizin runs with the land in, 135.
covenants implied by words "grant, bargain and sell" in, 156.
a scroll may be used as a seal in, 179.
record of deed constructive notice from date of filing only, 246.
what constitutes actual notice sufficient to supply the place of registration, 258.
registration of deed having no seal or scroll imparts notice, 266.
deed not indexed imparts notice, 266.
leases not in writing have the force and effect of estates at will, 322.
mortgagee entitled to possession of premises after condition broken, 367.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by curtesy, 538, 539.
devise to witness to the will how far void, 541.
number of witnesses required to will, 550.
marriage of single woman avoids her will previously made, 566.
marriage and birth of child revokes will, 567.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
certified copy of will duly probated and recorded admissible in evidence, 580.
wills are required to be filed and recorded in office of probate, 580.
also in deed records, 580.
copy of will proved in other county may be recorded in county where land is situated, 580.

MISTAKE,
in reading deed to grantor who cannot read vitiates it, 174.
effect of release of mortgage obtained through, 494.
See EQUITY.

MONTANA TERRITORY,
the equitable doctrine of mortgages prevails, 372.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
number of witnesses required to will, 550.
property acquired after execution of will may pass by it, if so intended, 544

MORE OR LESS,
construction of, 98.

MORTGAGE,
formerly made by separate deed of defeasance, 61.
outstanding, an incumbrance, 142.
definition of a, 354.
origin and history of, 354-357.
origin of the English law of, 357.
nature of a, at common law, 357.
origin of equity of redemption, 358-360.
conflicting views of a, at law and in equity, 360, 361.
the doctrine reduced to a uniform system, 361.
nature of a, in the different States, 361-373.
modern common-law doctrine of, 362-368.
how modified in some States, 366.
doctrine of equity adopted in what States, 368-370.
consequences resulting from these different views, 370, 371.

[The references are to pages.]

MORTGAGE—Continued.
classification of States in reference to nature of, 371, 372.
form and requisites of, 374-394.
what is essential to constitute a, at law, 375-378.
what will constitute a, in equity, 378, 379.
parol evidence to prove an absolute deed a, 380-383.
distinction between a, and a conditional sale, 383-385.
classification of the different kinds of, 386-394.
common-law form of, 387.
power of sale, 387.
deed of trust in nature of, 388, 389.
what included under term, equitable, 389, 390.
deposit of title deeds, 391.
vendor's lien, 392-394.
form generally, 394-400.
statutory forms, 395.
causes ordinarily contained in a, 396.
granting part of a, 396-400.
how far the rules governing purchase deeds apply to, 396.
recital of indebtedness in a, 397.
consideration named in a, 397.
granting clause in a, 398.
description of premises in a, 398.
effect of a, upon subsequently acquired property, 399.
See DESCRIPTION.
office of the *habendum* in a, 400.
the defeasance, 401-415.
usual form of the condition in a, 401.
condition essential to a, 401.
may be in form of a declaration of trust, 401.
See EVIDENCE.
a debt or obligation essential to a, 402.
no personal obligation essential to a, 402.
debt need not be evidenced by separate instrument, 402.
what will constitute sufficient consideration to support a, 402.
illegal consideration will avoid a, 403.
whether property can be recovered after foreclosure for illegality in consideration, 403.
may be void in part and valid in part, 404.
whether a, once paid can become effectual security for new liability, 404.
whether a, can be extended to cover additional obligations, 404, 405.
not affected by change in form of the indebtedness, 405.
what debts may be attached to security of, 405.
English doctrine of tacking does not apply in this country, 405.
interest included within lien of, 406.
attorney's fees, 406.
costs and expenses, 406.
future advances, 407.
rights of holder of, to secure future advances, as against subsequent incumbrancers, 407.
whether unliquidated damages can be secured by, 408.
support as a consideration for a, 408, 409.
description of debt, 409-413.
degree of accuracy required in describing debt, 409, 410.
description must be sufficient to direct attention to source of full information, 412.
note competent evidence to explain, when, 412.
description of debt in mortgage to secure future advances, 413.

[The references are to pages.]

MORTGAGE.—Continued.
as to time of payment, 413.
failure to pay any installment of interest or principle a default, 414.
proviso that upon default in payment of interest the whole debt shall become due, 415.
special stipulations in a, 416-428.
covenants for title, value of, in a, 416.
effect of in, to secure purchase-money, 417.
covenant for payment of interest, 417.
when usurious, 418.
commission to agents whether usury, 419.
practice of reserving interest from loan, 420.
compound interest, 421.
what law governs as to interest and usury, 422.
covenant to keep premises in repair, 422.
when important, 422.
injunction for waste, 423.
covenant for payment of taxes, 423.
purposes of, 423.
breach of, authorizes foreclosure, 423.
cannot be enforced after foreclosure, 424.
taxes may be tacked to debt, 424.
covenant to keep the premises insured, 425.
mortgagee may waive forfeiture for breach of, and effect insurance himself, 425.
or may insure in his own behalf, 425, 426.
or mortgagor, if he has not covenanted to insure, may insure for his own benefit, 426.
in what case insurance money is to be applied to discharge of debt, 426.
reservation of the right of possession, 427.
importance of, where common-law doctrine prevails, 427.
effect of, 427, 428.
reservation of right to perform the condition before time limited, 428.
right does not exist in absence of, 428.
construction of, 428.
reservation of right to have a portion of premises released, 428.

See DISCHARGE.

power of sale in a, 429-437.
no particular form of words necessary to, 429.
power may be in separate instrument, though not desirable, 430.
whether power will be implied, 430.
assigns must be named, in order to be entitled to exercise the power, 431.
assignee must be the legal holder of both debt and mortgage, 431.
equitable assignee cannot exercise power of sale, 431.
nor an assignee of a part of the mortgage estate, 432.

See ASSIGNMENT.

whether power to several persons can be exercised by part of them, 432.
if one trustee dies, the survivor takes the entire legal estate, 433, 434.
whether a trustee can assign, 433.
new trustee may be substituted, when, 434.
proviso that sheriff may execute power, 434.
whether mortgagee may become purchaser under sale by sheriff, 434.
upon what right to exercise the power depends, 435.
what notice required, 435.
whether purchaser is bound to see that terms of power have been complied with, 435, 436.
application of proceeds of sale, 436.

[The references are to pages.]

MORTGAGE—Continued.
See FORECLOSURE; POWER; NOTICE.
assignment of a, 438-466.
as to rights and liabilities of purchasers of equity of redemption, 438-447.
See EQUITY OF REDEMPTION.
as to assignments of the mortgage, 448-466.
See ASSIGNMENT.
redemption of a, 467-477.
See REDEMPTION.
payment of a, 477-487.
See PAYMENT.
discharge of a, 487-495.
See DISCHARGE.
foreclosure of a, 496-532.
See FORECLOSURE; POWER OF SALE.

MORTGAGEE,
right of, in mortgaged premises, 364-368.
degree of diligence required of, in selling mortgaged property, 525-527.
whether, may become purchaser of property sold by him under power of sale, 528, 529.

MORTGAGOR,
effect of lease of mortgaged property by, 282.
right of, in mortgaged premises, 364-368.

MORTMAIN. See CORPORATION.

N.

NAMES,
of parties to deeds need not be accurate, 71.
uncertainty in, renders deed void, 71-73.
whether grantor must be named in body of deed, 71.
deed to person by surname only, void, 73.
deed not affected by omission of middle name of grantee, 73.
party executing deed by wrong name, estopped to deny deed, 73.
as to deed to partners in firm name, 74.
signing of, by grantor to deed, 175.

NEBRASKA,
authority to agent to sign contract of sale must be in writing, 11.
covenant against incumbrances does not run with the land in, 140, 141.
record of deed constructive notice from date of filing only, 246.
time for which parol leases are binding, 322.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
method of releasing mortgages, 491.
strict foreclosure the usual form, 506.
age at which persons may make will of real estate in, 537.
a married woman can only make a will by consent of her husband, 538, 539.
devise to witness to the will, how far void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
will executed and proved in accordance with law of place of testator's domicil, valid in, 574.
wills are required to be filed and recorded in office of probate, 580.

NEGOTIABLE INSTRUMENT,
renders mortgage security assignable, 458.

The references are to pages.]

NEVADA,
homestead cannot be mortgaged except for purchase-money, 170.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will same as if sole, 538, 539.
will must be sealed, 550.
number of witnesses required to will, 550.
marriage revokes will of husband, unless provision is made for wife, 567.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.

NEW HAMPSHIRE,
re-delivery of deed for purpose of cancellation, revests title in grantor, 24.
grantor need not be named in body of deed in, 71.
effect of covenant of seizin in, 137.
public highway an incumbrance in, 145.
wife may release dower to owner of fee by her separate deed in, 166.
wife may bar dower by signing and sealing husband's deed of his land, 168.
deed good between parties in, without witness, 182.
two witnesses required to deed in, 182.
competency of witnesses to deed in, 183.
record of deed constructive notice from date of filing only, 246.
leases not in writing have the force and effect of estates at will, 322.
leases required to be by deed, when, 322.
the common-law doctrine of mortgages prevails, 372.
no lien exists in favor of vendors, 393.
entry and possession the usual remedy for enforcing a mortgage, 508.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
devise to witness to will when void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
will must be sealed, 550.
qualification of witnesses to will, 550.
wills are required to be filed and recorded in office of probate, 580.

NEW JERSEY,
fifteen days allowed for recording deed, 247.
precedence of record between deeds recorded after prescribed time, 248.
time for which parol leases are binding, 322.
mortgagee entitled to possession of premises after condition broken, 367.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgage by deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
devise of witness to the will void, 541.
property acquired after execution of will may pass by it, if so intended, 544.
number of witnesses required to will, 550.
will executed and proved in accordance with laws of place of testator's domicil valid in, 574.
wills are required to be filed and recorded in office of probate, 580.

NEW MEXICO,
married women may devise and bequeath the same as if sole, 538, 539.
the common-law doctrine of mortgages prevails, 372.

[The references are to pages.]

NEW YORK,
deed not invalidated in, by insertion of grantee's name after delivery, 26.
deeds required to be made direct to party in interest in, 67.
uses abolished by statute in, 117.
public highway, whether an incumbrance, 145.
statute providing that no covenant shall be implied in conveyances of real estate does not apply to leases, 155.
witness required to deed, when, 182.
deed defectively acknowledged not admissible in evidence, 225.
mortgagee out of possession not an assignee of whole term, 328.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgage, by deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will void, 541.
witnesses to the will are not required to sign in presence of testator, 554.
marriage and birth of child revokes will, 567.
marriage of single woman avoids her will previously made, 567.
number of witnesses required to will, 550.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
wills are required to be filed and recorded in office of probate, 580.

NON-SANE PERSONS,
incapable of making valid deed, 32.
what degree of intellectual weakness will render deed void, 32.
deed or lease of, not under guardianship, voidable, 32, 279.
deed or lease of, under guardianship void, 32, 279.
deed made to, is voidable, 40.
capacity of, to make will, 539.
See DURESS.

NOTARY PUBLIC. See ACKNOWLEDGMENT.

NORTH CAROLINA,
a seroll may be used as a seal in, 179.
time allowed for recording deeds in, 247.
deeds not recorded within the prescribed time become void, 247.
lease must be signed by both parties to be binding, 325.
the common-law doctrine of mortgages prevails, 372.
equity jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
devise to witness to the will void, 541.
number of witnesses required to will, 550.
holographic wills how proved, 557.
marriage revokes a will when, 567.
copy of foreign will, proved in home jurisdiction, may be admitted to probate in, 574.
whether wills are required to recorded in, 580.

NOTICE,
effect of recitals as, 76.
registration as, 241, 268.
actual notice equivalent to record, 252.
effect of possession as, 253.
what constitutes actual, 254.

[The references are to pages.

NOTICE.—Continued.
degree of proof required to establish, 258.
to agent notice to principal, 257.
effect of quitclaim deed as, 64, 260.
of sale under power in mortgage, what required, 515.
requisites of, 517-524.
See POWER OF SALE; REGISTRATION.

O.

OHIO,
covenant of seizin runs with the land when, 135.
in what case covenant against incumbrances runs with the land in, 141.
a scroll may be used as a seal in, 179.
six months allowed for recording deed, 247.
precedence between deeds recorded after prescribed time, 248.
leases not in writing have the force and effect of estates at will, 322.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no equitable lien arises on deposit of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
devise to witness of the will how far void, 541.
number of witnesses required to will, 550.
marriage does not revoke will of single woman, 567.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
wills are required to be filed and recorded in office of probate, 580.
certified copy of will duly probated and recorded admissible in evidence, 580.

OREGON,
a scroll may be used as a seal, in, 179.
deed not indexed imparts notice, 267.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
devise to witness to the will void, 541.
number of witnesses required to will, 550.
marriage and birth of child revokes will, 567.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.

P.

PARAMOUNT TITLE. See COVENANT.

PAROL EVIDENCE. See EVIDENCE.

PAROL LEASE,
limited by statute to short term, 270.

PARTIES,
to deed, competency of, 28-44.
must be *in esse* at time of delivery of the deed, 43.
rule does not apply to remaindermen, 44.
nor to grant of incorporeal hereditament, 44.

[The references are to pages.]

PARTIES—Continued.
how far grants to charitable uses form exceptions to rule, 44.
to lease, competency of, 276-283.
to mortgage, must be competent to convey and take title to land, 375.
to a devise, competency of, 523-542.
names of. See NAMES.
See also DISSEIZEE; INFANTS; NON-SANE PERSONS; MARRIED WOMEN; HUSBAND AND WIFE.

PART PERFORMANCE,
what, will take parol agreement out of Statute of Frauds, 12.

PARTITION,
ancient deed of, 58.
power of compelling, now exercised by the courts, 58.

PARTNER,
implied power of, does not extend to execution of instruments under seal, 38.
deed of one, in firm name, only affects his interest, 39.
may by express authority make deed binding firm, 39.
such authority may be either by previous assent or subsequent ratification, 39.
whether such assent or ratification must be by instrument under seal, 39.
whether assent or ratification may be implied from conduct of firm, 39.
power of, to make valid lease binding the firm, 282.
entry by one under lease signed by another constitutes ratification of lease, 323.

PARTY WALL,
whether an incumbrance, 143.

PAYMENT,
time of, should be fixed in a mortgage, 413-415.
of a mortgage, effect of, 477-480.
tender of, before and after default, 478, 479.
as to the sufficiency of a tender of, 480, 481.
by and to whom tender of, must be made, 480.
what constitutes, of mortgage, 482-485.
presumption as to, of mortgage, 485.
whether, operates as a discharge or assignment of mortgage, 486.

PENNSYLVANIA,
authority to agent to sign contract of sale must be in writing, 10.
deed not invalidated in, by insertion of grantee's name after delivery, 26.
statutes against mortmain adopted in, 42.
highway, when an incumbrance, 145.
covenants implied by words, "grant, bargain and sell" in, 156.
statutes designed to cure defective acknowledgments of deeds in, 240.
six months allowed for recording deed, 247.
precedence between deeds recorded after prescribed time, 248.
deed not properly indexed is not constructive notice, 267.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will the same as if sole, 538, 539.
whether property acquired after execution of will may pass under its provisions, 544.
number of witnesses required to will, 550.
witnesses to will are not required to be subscribing witnesses, 550.

[The references are to pages.]

PENNSYLVANIA—Continued.
holographic wills how proved, 557.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.

PERPETUITY,
rule against, 272.

POSSESSION,
effect of, as notice, 253.
right of, as between mortgagor and mortgagee, 427, 428,

POWERS,
are of two sorts, at common law and under the Statute of Uses, 124.
of appointment, definition of, 124, 125.
distinction between, and trusts, 125.
general and particular distinguished, 125.
collateral, 125.
appendant, 125.
in gross, 125.
how created, 126.
execution of, must not tend to create perpetuity, 126.
who may execute, 126.
as to married women, 127.
when conferred upon several, 127.
where donee has an interest in the estate, 127.
authority conferred by, cannot be delegated, 127.
conditions annexed to the exercise of, must be strictly complied with, 127, 128.
to execute deed, cannot be executed by will, 128.
mere nominal conditions may be disregarded, 128.
to sell, does not ordinarily include, to mortgage, 128.
need not be referred to in execution, 129.
appointees of, take under original deed, 130.
deed under, subject to registry laws, 130.
equity jurisdiction over the execution of, 130.
suspension of, 130.
how released or destroyed, 130, 131.
created by what words, in a will, 596.
execution of, 598.

POWER OF ATTORNEY,
definition and requisites of, 208.
to execute deed, must be under seal, 208.
who may make, 209.
whether married women may appoint an attorney, 209.
authority under, cannot be delegated, 210.
whether power conferred upon several persons may be exercised by part of them, 210, 212.
who may act as attorney, 211.
are strictly construed, 212.
authority to execute deed must be express and special, 213.
to sell land means for cash, 214.
how far power must identify land, 214, 215.
to sell land for specified purposes, 215.
relinquishment of dower by, 215.
may be revoked, when, 216.
essentials to a revocation of, 216.
death, insanity, or marriage of principal, when a revocation, 216, 217.
must be strictly pursued, 216.
manner of executing deed under, 217-221.

[The references are to pages.]

POWER OF SALE IN A MORTGAGE,
nature of, 387, 388.
form and requisites of, 429.
may be contained in separate instrument, 429.
should be express and special, 430.
whether, will be implied, 430.
right of assignee of mortgage to exercise, 430, 431.
equitable assignee not entitled to execute, 431, 432.
See ASSIGNMENT.
when vested in several persons, how executed, 432.
cannot be delegated by trustee, 433.
effect of death or removal of trustee, 433, 434.
events upon which exercise of, depends, 435.
of what purchasers under, are bound to take notice, 435, 436.
application of proceeds of sale under, 436.
foreclosure by sale under, 509-532.
accumulative remedy, 509, 510.
when exercise of a, will be enjoined, 511-513.
who may exercise a, 514, 515.
may be executed by assignee of mortgage, when, 514.
notice required of a sale under a, 515, 516.
requisites of notice of sale under, 517, 518.
description of the property in notice of sale under, 519.
time of sale under, 521.
how sale under, in a mortgage, must be conducted, 524.
powers and duties of trustee in selling under, 525-528.
who may purchase at sale under, 528, 529.
right of trustee to purchase at sale under, 529.
requisites of deed in pursuance of sale under, 530-532.

PREMISES. See DESCRIPTION.

PRESUMPTION,
whether alteration of deed is presumed to have been made before or after delivery, 23.
as to date of deed, 70.
as to delivery of deed, 70, 185.
of delivery of deed, from its possession, 199.
as to payment of mortgage, 485.

PRINCIPAL AND AGENT,
authority of agent to sign contract of sale, whether required to be in writing, 10.
agent cannot delegate his authority, 11.
agent must act in name of principal, 11.
whether name of principal must be inserted in order to bind him and relieve agent, 11.
deed executed in name of agent will not bind principal, 74.
will operate as deed of agent, 75.
actual notice of deed to agent is notice to principal, 257, 258.
execution of lease by agent, 323, 324.
essentials of authority to agent to execute lease, 324.
whether authority of agent to make lease must be under seal, 324.
how agent must execute lease in order to bind principal, 324.

PRIORITY. See REGISTRATION; QUITCLAIM.

PRIVATE WAY,
whether an incumbrance within covenant against, 143.

PRIVITY,
of estate and of contract defined, 332, 333.

The references are to pages.

PROBATE.
of wills, 571-578.
preliminaries to, 571-572.
court within which probate of a will should be had, 572.
by whom proceedings for, are to be initiated, 573.
jurisdiction of, 573.
of foreign wills, 574.
statutes of the several states relative to, 574, 575.
two modes of, common form and solemn form, 576.
what facts must be proved, 577.
effect of, 577, 578.

PROOF.
of deeds, by subscribing witnesses, 241.
will not take place of separate acknowledgment of married women, 241.
of wills,
see PROBATE.

PROVISO,
of re-entry in lease, 274.
see CONDITION.
in mortgage, 411-413.
See MORTGAGE. DEFEASANCE.

PUBLIC WAY.
whether an incumbrance, 144.

PURCHASE-MONEY. See CONSIDERATION. VENDOR'S LIEN.

PURCHASER.
bona fide, for value, who is, 259.
See QUIT-CLAIM; NOTICE; REGISTRATION.

Q.

QUANTITY OF LAND,
mentioned in deed, how far descriptive only, 87.

QUIA EMPTORES, STATUTE OF,
adopted as common law in most of the States, 28.

QUIET ENJOYMENT. See COVENANT.

QUIT-CLAIM DEED,
similar to ancient deed of release, 59, 64.
peculiarly American in its characteristics, 64.
rights of purchaser under, 65, 259.
will not pass an after-acquired title, 65.
whether covenants running with the land will pass by, 65, 66.

R.

RAILWAY,
whether an incumbrance, 144.

READING,
necessity of, as part of execution of deed, 173.
effect of fraud or mistake in, 174.

REAL COVENANTS. See COVENANT.

RECITALS
in deed, purpose and object of, 75.
not evidence of the facts stated, 75.
unless made so by statute, 75.
when estopped from denying, 76.

[The references are to pages.]

RECITALS.—Continued.
effect of in ancient deeds, 76.
degree of confidence to be placed in, 76.
effect of, in giving notice of dormant title, 77.
grantee, how far bound by, 77.
purchaser bound to prosecute inquiries suggested by, at his peril, 77.
in mortgage, what are usual, 397.
in mortgagee's or trustee's deed, 532.

RECONVEYANCE. See DEFEASANCE.

RECORD,
copy of, to be used in another State, how authenticated, 575.
See REGISTRATION: NOTICE; EVIDENCE.

RECOVERIES,
as a mode of conveying land.
See FINE AND RECOVERY.

REDEMPTION,
of right of, by mortgagor, 467, 468.
when the right of, is barred, 468, 469.
who entitled to, 470.
of the sum payable to effect, 472.
of the mortgagee's liability to account on a, 473, 475.
contribution to effect, 476.
See EQUITY OF REDEMPTION.

REDDENDUM,
object and purpose of, 106.
distinguished from an exception, 106.
words used to create, 106.
sometimes construed as implied covenant, 107.
construction of, 107.
essentials to a good, 107.
property reserved must be definitely described, 107.

RE-ENTRY. See CONDITION.

RE-EXECUTION. See ALTERATION.

REFERENCE,
to deed, map or survey, effect of, 98.

REFORMING DEED,
when deed may be reformed, 88.

REGISTRATION,
of deed, not delivery, 196.
acknowledgment of deed as an essential to, 225.
distinction between enrollment and, 242.
purpose of, 242.
equivalent to livery of seizin, 242.
when record of deed is constructive notice, 243-245.
necessity of acknowledgment or proof, 243.
laws of, do not apply to disposition of lands by United States, 243.
effect of, not authorized by law, 244.
of defectively executed deeds, 244.
is constructive notice of what, 244.
effect of, in the wrong county, 245.
where land lies in two counties, 245.
at what time record takes effect as notice, 245.
(See the STATES SEVERALLY.)
effect of recording within statutory time, 246, 247.
when a deed may be considered as recorded, 248.
proof of the date of filing for record, 249.

[The references are to pages.]

REGISTRATION—Continued.
to whom the record is notice, 249.
of what fact the record is notice, 250.
as to deeds disconnected from the chain of title, 251.
actual notice equivalent to, 252.
not necessary as between parties to deed, 252.
possession of premises as constituting notice, 253.
necessary character of the possession, 253.
what constitutes actual notice, 254-257.
diligence required of purchasers in pursuing inquiry suggested, 255.
notice to agent is notice to principal, 257-258.
effect of notice to one member of a corporation, 258.
effect of notice to husband, where land purchased by wife, 258.
degree of proof required to establish actual notice, 258.
unrecorded deed void, when, 259.
what constitutes a *bona fide* purchaser, 260, 261.
effect to quitclaim deed as notice, 64, 260.
rights of a purchaser from an heir, 261, 262.
rights of purchasers at sheriff's sale, 263.
right of a judgment or attaching creditor, 264.
right of mortgagee in a mortgage to secure pre existing debt, 264
whether purchaser at mortgage sale is purchaser for valuable consideration, 264.
equity extinguished by a purchase without notice, 264.
effect of mistake in record of deed, 265.
effect of destruction of record, 265.
seal of acknowledging officer need not be recorded, 266.
whether record of deed is notice until indexed, 267.
corrections and alterations of the record, 267, 268.
of lease, how far necessary, 322.
of wills, statutory requirements in different States, 579, 580.
certified copies of record admissible in evidence, 580.
copy may be recorded in different counties, 580, 581.
of foreign wills, 580.
how authenticated, 575.
in what office recorded, 580, 581.
effect of record, 574.
in what States wills are required to be recorded in deed records, 580.
See PROBATE.

RELATION,
doctrine of,
See DELIVERY.

RELEASE,
deed of, essential to, 58.
distinction between, and quitclaim deed, 58, 64.
of mortgage,
See DISCHARGE.

REMAINDER,
distinguished from a condition, 112.

RENT,
an essential incident to a lease, 289.
need not be money, 289.
need not be fixed at creation of tenancy, 289.
implied agreement to pay, 289.
lease founded upon fraudulent or unlawful consideration, void, 289.
words used in reserving, 289.
to whom must be reserved, 289.

[The references are to pages.]

RENT—Continued.
lessee liable to pay notwithstanding the destruction of premises, 305-307, 311.
effect of eviction of lessee upon his liability to pay, 311-311.
effect of assignment of lease upon lessee's liability for, 332.
receipt of, a waiver of forfeiture, when, 340.

RENEW. See COVENANT.

REPAIRS. See COVENANT.

REPUBLICATION.
of will, what constituted, express, 568.
constructive, 569.

REPURCHASE,
right of, distinguished from mortgage, 383, 384.

REPUTATION,
evidence of, when admissible in fixing boundaries, 94.

RESERVATION. See REDDENDUM.
sometimes construed as an implied covenant, 107.
of rent in a lease, 289-290.
of right to enter and make repairs, 307.
of the right of possession to the mortgagor in a mortgage, 427.
of the right to perform the condition, in a mortgage, 428.
of the right to have a portion of premises released, 428.

RESIDUARY DEVISE. See DEVISE.

RESTRAINT OF MARRIAGE,
condition in, void, 110.

RESULTING TRUST. See TRUSTS.

REVOCATION,
of power of attorney, 216.
of will, different modes of, 558-568.
by subsequent will or codicil, 559-561.
by cancellation or destruction, 561-563.
whether cancellation of will revoking former will revives the latter, 563.
by alienation or alteration of the estate, 664-566.
by marriage and birth of issue, 566-568.

RHODE ISLAND,
time for which parol leases are binding, 322.
the common-law doctrine of mortgages prevails, 372.
equity jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
method of releasing mortgages, 491.
entry and possession the usual remedy for enforcing a mortgage, 505.
age at which persons may make will of real estate, 537.
married women may devise real estate, subject to husband's right by the curtesy, 538, 539.
devise to witness to the will void, 541.
number of witnesses required to will, 550.
copy of foreign will, proved in home jurisdiction, may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate, 580.

[The refereeces are to pages.]

RIGHT,
of redemption.
See EQUITY OF REDEMPTION.

RIVERS,
what are navigable, rule as to boundaries on, 95-97.

RULE IN SHELLEY'S CASE,
defined, 103.
how far in force in United States, 103, 104.

S.

SALE,
of real estate.
See CONTRACT.

SATISFACTION,
of mortgage, entry of, 490-492.
See DISCHARGE.

SCROLL,
may be used as seal, in what States, 179.
must appear that the instrument was intended to be sealed, 163.
See DEED.

SEAL,
of officer taking acknowledgment must be attached, 237.
essential to validity of deed at common law, 177.
in what States abolished, 178.
what constitutes a, at common law, 178.
scroll may be used as, in what States, 179.
several persons may adopt the same, 180.
of corporation, 181.

SEIZIN. See LIVERY OF SEIZIN.

SEPARATE ESTATE. See HUSBAND AND WIFE; MARRIED WOMEN.

SHELLEY'S CASE. See RULE IN SHELLEY'S CASE.

SHERIFF,
memorandum of sale by, binding upon both parties, 10.

SHERIFF'S SALE,
rights of purchaser at, under registry laws, 263.

SHIFTING USE. See USES.

SIGNATURE,
to contract for sale of land, what sufficient, 9.
when required to be at bottom of the instrument, 10.
by agent to executory contract, what authority sufficient to authorize, 10.
of corporation having a common seal, 10.
to deed, what is sufficient, 175.
by third person in grantor's presence, 175.
by third person in grantor's absence, must be authorized by sealed instrument, 175, 176, 208, 217.
implied power of partner does not authorize, to sealed instrument, 38, 39.
by wrong name, effect of, 176.

[The references are to pages.]

SIGNATURE—Continued.
when forged, no notice is necessary to make the deed a nullity, 176.
where one of several grantors acts as attorney for the others, 176.
by corporation, 176.
to lease, by firm, 323.
to will, what sufficient, 548.
whether name at commencement or in body of the instrument may amount to, 549.
in some States required by statute to be at the end of the instrument, 548.
how testator may sign will, 548, 549.
will may be signed by another person by his direction and in his presence, 549.
of testator, must be made or acknowledged in presence of the witnesses, 550
before attestation, 550.
See ATTESTATION.

SOUTH CAROLINA,
covenant against incumbrances held to run with the land, 140.
a scroll may be used as a seal in, 179.
two witnesses required to deed in, 182.
time allowed for recording deeds in, 247.
deeds not recorded within the prescribed time become void, 247, 248.
equity jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgage by deposit of title deeds, 391.
no lien exists in favor of vendors, 393.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will same as if sole, 538, 539.
devise to witness to the will how far void, 541.
qualification of witnesses to will, 550.
copy of foreign will, proved in home jurisdiction, may be admitted to probate in, 574.

SPECIFIC PERFORMANCE,
of contract for sale of real estate, 15.
rights of the parties on, 15.
when equity will compel, 16.
depends upon the inadequacy of remedy at law, 16, 17.
penalty added in contract of sale, as liquidated damages, will not prevent, 16.
mutual enforcement must be practicable in order to obtain, 16.
will not be decreed against a vendor who has no title, 17.
but otherwise if vendor can make a good title on final hearing of the bill for, 17.
contract must be complete and certain both as to parties, price and subject-matter, 17.
contract must be supported by a valuable consideration to authorize enforcement of, 17.
mere inadequacy of consideration will not prevent, 17.
not decreed, in case of uncertainty, 18.
not decreed, where there is a want of fairness, 18.
not decreed, when it imposes great hardship on either party, 18.
mistake, misrepresentation of fraud will prevent, 18.
of covenant to renew lease, 309.

SPRINGING USE. See USES.

STATUTES. See the STATES SEVERALLY.

The references are to pages.

STATUTES OF FRAUDS,
when enacted, 2.
contract of sale required to be in writing by, 2.
to what interest in land it applies, 3.
statutory definition of interest in land contemplated by the, 3.
what the contract must contain, 5.
memorandum of sheriff or auctioneer sufficient to contract under, 5.
whether consideration must be expressed in writing under, 6.
contract need not be contained in a single instrument, 7.
if in different documents, they must all relate to same contract, 7.
no particular form of agreement required by, 7.
description of property in contract of sale, what sufficient under, 7.
contract must be signed by party to be charged, 9.
whether both parties must sign or be bound by contract, 9, 10.
in what part of the instrument the signature may appear, 10.
fixing initials, the name appearing elsewhere, a sufficient signature under, 10.
whether a printed signature is sufficient under, 10.
whether signature with lead pencil is sufficient under, 10.
agreement need not be under seal, 10.
corporation aggregate must use common seal in signing, 10.
signature by agent to agreement for sale under, 10.
in what States authority of agent to sign contract of sale must be in writing, 11.
form in which agent should sign, 11.
what part performance will take parol agreement out of, 12-14.
statutory provisions as to effect of part performance, 12.
payment of earnest or purchase-money does not constitute such part performance, 14.
effect in equity, of making improvements upon the faith of a parol contract of sale, 15.
deeds required to be in writing under, 20.
part printed and part written deed, a sufficient compliance with, 20.
signing deed necessary under, 21.
whether printed signature is sufficient under, 21.
whether deed written and subscribed with pencil is void under, 21.
creation of trusts under, 123.
effect of, upon execution of lease, 322.
requirements of, as to assignment of lease, 331.
requirements of, as to express surrender of lease, 345, 346.
mortgages required to be executed in same manner as deeds, 374, 375.
proving absolute deed a mortgage, an exception, or innovation upon, 380.
doctrine of equitable lien by deposit of title deeds in conflict with, 391.
assignment of mortgage under, 448.

STATUTES OF LIMITATION. See LIMITATION.

STATUTES OF USES,
conveyances deriving their effect from, 61.
effect of upon deed of defeasance, 61.
covenant to stand seized, 61.
bargain and sale, 62, 63.
fine and recovery, 64.
deeds under, must have consideration, 79, 80.
to what extent recognized in the United States, 117.

STIPULATIONS. See CONDITIONS; COVENANT.

STREAMS,
rules as to, being boundaries of land, 95, 96.

[The references are to pages.]

STREAMS—Continued.
what are navigable, 96.
ownership of soil under navigable, 97.

STREET,
bounding land by, include the soil to its center, 95.

STRICT FORECLOSURE,
of mortgage,
See FORECLOSURE.

SUBSCRIBING WITNESSES. (See the STATES SEVERALLY.)
to deed, number required in the different States, 181, 182.
qualification of, 183.
to lease, number required, 323.
to will, number required, 550, 551.
qualification of, 551.
See ATTESTATION.

SUBROGATION. See PAYMENT.

SUNDAY,
delivery of deed on, void, 53.

SUPPORT,
mortgage for, 408.
See CONDITION.

SURETY,
mortgage to idemnify, 406.
See CONDITION.

SURRENDER,
definition of, 60.
is the converse of a release, 60.
operates by the falling of a less estate into a greater, 60.
privity of estate essential to a, 60.
deed of, when necessary, 60.
See DETERMINATION.

SUSPENSION,
of power, 130.
See POWERS.

T.

TACKING,
doctrine of, 405.
See MORTGAGE.

TAXES,
lien of, an incumbrance, 142.
whether taxes assessed after conveyance, but on list, existing at time thereof is an incumbrance, 142, note.
covenant for payment of, in mortgage, 423, 424.
payment of, may be enforced by condition how, 423.
See COVENANT.

The references are to pages.

TENANCY,
modes of creating, at common law, 270.
nature of, existing between mortgagor and mortgagee, 364.

TENANTS IN COMMON,
cannot convey a distinct portion of common estate, 38.
deed of, valid as to all persons except his co-tenant, 38.
may convey his entire undivided interest, 38.
partition of lands between, 58.
effect of lease by, 282.
lease of, how enforced, 282.

TENANT FOR LIFE,
rights and duties of a, 270, 271.

TENANT FOR YEARS,
may grant under lease, when, 281.
distinction between under-lease and assignment, 281.
essentials to an under-lease, 281.

TENDER. See PAYMENT.

TENNESSEE,
valuable consideration not essential to deed of bargain and sale in, 62.
effect of covenant of seizin in, 137.
homestead cannot be aliened, except by joint deed of husband and wife in, 168.
what constitutes a sufficient seal in, 179.
two witnesses required to deed in, 182.
record of deed constructive notice from date of filing only, 246.
lease valid, though not proved and recorded, 323.
the common-law doctrine of mortgages prevails, 392.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 393.
married women may devise real estate subject to husband's right by the curtesy, 538, 539.
whether property acquired after execution of will may pass under its provisions, 541.
number of witnesses required to will, 550.
holographic wills how proved, 557.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 571.
wills are required to be filed and recorded in office of probate, 580.

TERM OF YEARS,
an incumbrance, 142.
how created, 271, 272.
incidents of, 272.

TESTAMENTARY. See WILLS.

TESTIMONIUM CLAUSE,
object and purpose of the, 163-172.
form of, 163.
seal should be mentioned in, when scroll is used, 163.
as to the relinquishment of dower and homestead in, 164-172.
See DOWER; HOMESTEAD.

TEXAS,
whether deed is invalidated in, by insertion of grantor's name after delivery 27.

[The references are to pages.

TEXAS—Continued.
homestead cannot be aliened, except by joint deed of husband and wife in 168.
homestead cannot be mortgaged, except for purchase-money, 169, 170.
use of seals abolished, 178.
certificate of acknowledging officer as to private examination of married women, conclusive, 239.
record of deed constructive notice from date of filing only, 246.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
lien exists in favor of vendors for purchase-money, 392.
age at which persons may make will of real estate in, 537.
married woman may devise and bequeath the same as if sole, 538, 539.
number of witnesses required to will, 550.
holographic wills how proved, 557.
birth of posthumous child for whom no provision is made revokes will, 567.
foreign will which has been duly probated in place of testator's domicil may be recorded, and such record has effect of probate, 574.
wills are required to be filed and recorded in office of probate, 580.

TIDE WATERS,
what are, 96, 97.

TIME,
computation of, for continuance of lease, 338.
lease for month means how long, 338.

TITLE,
of mortgagor and mortgagee to mortgaged premises, 366-370.

TITLE DEEDS,
deposit of, as constituting a mortgage, 391.

TRUST DEEDS. See DEEDS OF TRUST; MORTGAGE.

TRUSTEE,
power of, to make lease, 283.
where there are several, all must act in executing trust, 283.
cestui que trust should join in making lease, 283.
what required of, in selling mortgaged property under power of sale, 524-528.
prohibited from purchasing at his own sale, 528.
See POWER OF SALE.
one, cannot convey aliquot part of estate vested in him jointly with another, 38.

TRUSTS,
origin and history of, 118.
definition and classification of, 119-121.
what are resulting, 121.
definition of, constructive, 121.
as to the parties to, 121.
not allowed to fail for want of trustee, 121.
how may be created, 122-124.
no particular form of words necessary to create, 122.
effect of Statute of Frauds upon the creation of, 123.
evidence of trust required by the statute, 123.
form of declaration of, by married woman, 122.

[The references are to pages.]

U.

UNDUE INFLUENCE. See DEED; WILL.

USAGES. See EVIDENCE.

USES,
history of, at common law, 114.
object and effect of statutes of, 115.
definition of shifting or secondary, 116.
as to springing, 116.
operation of a springing use, 116.
as to future or contingent, 117.
in the United States, 117.

USURY,
when mortgage is void for, 418-422.
whether commission charged by agents of mortgagee constitutes, 419
whether discounting note constitutes, 420.
whether payment of compound interest will constitute, 421.
what law governs as to, 421, 422.

UTAH,
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 571.
will executed and proved in accordance with law of place of testator's domicil, valid in, 574.

V.

VALUABLE CONSIDERATION. See BARGAIN AND SALE; CONSIDERATION.

VENDOR'S LIEN,
for purchase-money, an equitable mortgage, 392.

VENUE,
of certificate of acknowledgment, 250.

VERMONT,
effect of covenant of seizin in, 137.
measure of damages for breach of covenant of warranty in, 161.
homestead cannot be aliened except by joint deed of husband and wife in, 168.
two witnesses required to deed in, 182.
record of deed constructive notice from date of filing only, 246.
deed not properly indexed is not constructive notice, 267.
leases are required to be acknowledged and recorded, when, 322.
leases not in writing have the force and effect of estates at will, 322.
leases required to be by deed, when, 322.
mortgagee entitled to possession of premises after condition broken, 367.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 38
no lien exists in favor of vendors, 393.
method of releasing mortgages, 491.
strict foreclosure the usual form, 506.

[The references are to pages.]

VERMONT—Continued.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to will when void, 541.
whether property acquired after execution of will may pass under its provisions, 544.
qualification of witnesses to will, 550.
copy of foreign will proved in home jurisdiction may be admitted to probate in, 574.
wills to be recorded both in office of probate and in record of deeds, 580.
copy of will proved in other county, may be recorded in county where land is situated, 580.

VIRGINIA,
in what cases the Statute of Uses executes the seizin to the use in, 117.
record of deed constructive notice from date of filing only, 246.
leases required to be by deed, when, 322.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.
age at which persons may make will of real estate in, 537.
married women may dispose of separate property by will same as if sole, 538, 539.
devise to witness to the will how far void, 541.
whether property acquired after execution of will may pass under its provisions, 544.
number of witnesses required to will, 550.
holographic wills how proved, 557.
marriage revokes a will when, 567.
copy of foreign will, proved in home jurisdiction, may be admitted to probate in, 574.
wills are required to be filed and recorded in office of probate. 580.

VOLUNTARY CONVEYANCE,
what is a, 48.
intent of donor alone governs as to character, of, 48.
when fraudulent intent will be presumed, 48, 49.
whether void as to subsequent creditors, 51.
valid and binding as between the parties, 79.

W.

WAIVER,
of forfeiture,
See CONDITIONS.

WARRANTY. See COVENANT.

WASHINGTON TERRITORY,
the equitable doctrine of mortgages prevails, 372.
married women may dispose of separate property by will same as if sole, 538, 539.

WEST VIRGINIA,
time for which parol leasss are binding, 322.
the common-law doctrine of mortgages prevails, 372.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
no lien exists in favor of vendors, 393.

The references are to pages.

WEST VIRGINIA—Continued.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will how far void, 541.
holographic wills how proved, 557.
marriage revokes a will, when, 567.
wills are required to be filed and recorded in office of probate, 580.

WILL,
definition of, 534.
nuncupative, 534.
holographic, 535.
codicil, 535.
distinction between a, and a deed, 535.
competency of parties to make, 536, 542.
See DEVISE.
subject-matter essential to operation of, 542.
what law governs validity of, 543.
what estate or interest in land will pass by, 543.
whether after-acquired property will pass by, 544.
the execution of, 546, 557.
governed by statute, 546.
(See the STATES SEVERALLY.)
must be in writing, 546.
of what material, 546, 547.
the signature of testator to, 548, 549.
in what State a, must be sealed, 550.
number of attesting witnesses required to, 550.
competency of attesting witnesses, 551.
how witnesses must sign, 552, 556.
See ATTESTATION.
execution of holographic wills, 557.
revocation of, 558, 568.
See REVOCATION.
republication of, 568, 570.
See REPUBLICATION.
probate of, 571, 581.
See PROBATE.
registration of, 579, 581.
See REGISTRATION.
construction of, 582, 598.
general rules of, 582, 588.
as to devisees, 588, 593.
as to estate and property conveyed by, 593, 596.
as to power to sell land in, 596, 598.

WISCONSIN,
whether re-delivery of deed for purpose of cancellation revests title in grantor, 25.
homestead cannot be alienated except by joint deed of husband and wife in, 168.
what constitutes a sufficient seal in, 179.
a scroll may be used as a seal in, 179.
record of deed constructive notice from date of filing only, 246.
the equitable doctrine of mortgages prevails, 372.

(The references are to pages.)

WISCONSIN—Continued.
ground of equitable jurisdiction to declare an absolute deed a mortgage, 382.
equitable mortgage by deposite of title deeds, 391.
lien exists in favor of vendors for purchase-money, 393.
method of releasing mortgages, 491.
age at which persons may make will of real estate in, 537.
married women may devise and bequeath the same as if sole, 538, 539.
devise to witness to the will, how far void, 541.
whether property acquired after execution of will may pass under its provisions, 544.
number of witnesses required to will, 550.
foreign will which has been duly probated in place of testator's domicile, may be recorded, and such record has effect of probate, 574.
copy of will proved in other county may be recorded in county where land is situated, 580.
wills to be recorded in office of registry of deeds, 580.

WYOMING,
method of releasing mortgages, 491.
married women may devise and bequeath the same as if sole, 538, 539.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA SEP 6 1952
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 729 723 7